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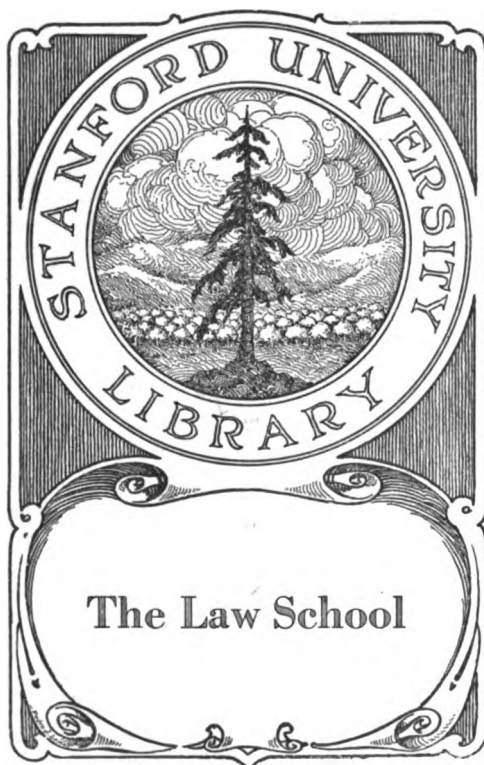
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11-17

THE
VICTORIAN LAW REPORTS.

UNDER THE SUPERINTENDENCE AND CONTROL OF THE COUNCIL OF LAW
REPORTING IN VICTORIA.

Supreme Court of Victoria.

CASES DETERMINED IN THE
SUPREME COURT OF VICTORIA
AND
IN CHAMBERS.

EDITOR—JOHN BURNETT BOX, *Barrister-at-Law.*

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VOL. XXIV.

1898 & 1899—LXI & LXII VICTORIÆ.

MELBOURNE :

Printed and Published under the direction of the Council of Law
Reporting in Victoria

BY GEORGE ROBERTSON & CO., LITTLE COLLINS STREET, MELBOURNE.

1899.

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Page	Line	For	Read
57	Note (<i>d</i>)	589	29
65	12 from bottom	"an"	"no"
120	8 from top	"than"	"then"
124	7 from bottom, after the word "steamships" insert the words "or sailing ships"		
133	13 from top, after the word "steamships" insert the words "or masters of sailing ships, or one of each—i.e., two 'nautical members' "		
151	2 of head note	1231	1241
340	9 from bottom	"degree"	"decree"
377	19 from bottom	"he gave"	"the plaintiff did not give any"
508	15 from top	"plaintiff"	"defendant"
559	15 from top	"(No. 1513), s. 9"	"(No. 1513), s. 95"
563	5 from top	39	139
720	3 from top	xvi.	xxxi.
724	6 from bottom	"allowed"	"disallowed"
794	7 from bottom	"have been"	"not be"

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Isaac A. Isaacs
Temple Cowit.

CASES

DETERMINED BY THE

SUPREME COURT OF VICTORIA AND IN CHAMBERS.

61 & 62 VICTORIÆ.

HALL v. BARTLETT.

Factories and Shops Act 1896 (No. 1445), s. 15 (8)—Employment at lower rate of wages than log rates—Intention to evade Act—Dispute as to liability for particular rate—Wages, contract as to.

1898
June 16.

Madden, C.J.

An employer, relying upon an alleged contract made without any intention to evade the provisions of the *Factories and Shops Act 1896*, who honestly disputes his liability to pay a particular or log rate of wages, is not liable to be convicted for a breach of the provisions of sub-sec. 8 of sec. 15 of Act No. 1445.

ORDER *nisi* to review.

The informant proceeded against the defendant Bartlett for breach of the *Factories and Shops Act 1896*. The defendant, who was a clothing manufacturer, employed one Annie Meghean at his factory, and the charge was for employing her at less than the log rate of wages established by the Board. It appeared that the defendant had at first employed the girl at weekly wages of 1*l.* per week, which rate was in accordance with the log rate. Subsequently, not considering that she was working fast enough to justify the continuance of that rate, he determined that she should be employed at piece-work wages; this was done after the commencement of the week's work, viz., on a Tuesday. The defendant said that he told the girl of this arrangement, and it was noted in a book kept for noting the work done on piece-work. The girl never signified her acceptance of this arrangement. At the end of one week the defendant tendered her 18*s.* as the price for piece-work, but the girl claimed that she had done extra work, even

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if she were to be paid by piece-work, and that that extra work was not allowed for. She claimed to be paid for weekly work at the log rate of 1*l.* per week.

The defendant relied upon the arrangement to pay by piece-work as a defence, and stated that he was willing to pay the balance if it were found that Meghean was entitled to more.

The justices convicted the defendant, and fined him 5*l.*

The defendant then obtained this order to review upon the ground that there was no evidence to support the conviction.

Mitchell to show cause—The justices have found as a fact that the defendant entered into a contract to evade the provisions of the *Factories and Shops Act*, and it was a question of fact for them to decide. The defendant was “employing” the girl under an agreement or understanding which tended to defeat the objects of the Act. He set up a contract as a defence that was not believed, and if the wages were paid under any other arrangement there was a distinct contravention of the terms of sub-sec. 8 of sec. 15 of the Act.

Cussen to move the order absolute was not called upon.

MADDEN, C.J. This case is similar to one decided by my brother A'Beckett, in which I had previously granted an order *nisi*. The case turns upon the effect of sub-sec. 8 of sec. 15 of the *Factories and Shops Act* 1896. (His Honor read the subsection.) The meaning of that is, that according to law a log price shall be established for weekly work and a log price for piece-work ; as soon as this is fixed no contract can lawfully provide for a lower rate of wages in the employment of a person in either piece-work or weekly work as the case may be. If in attempting to engage an *employé* the employer, in order to evade or defeat the log rate in either case, agrees that, while pretending to pay the log rate, he will pay a less rate, and the *employé* accepts those terms, then the employer would be guilty of an offence under this Act. It would be plain that his intention was to walk round the Act and the rates established under it. But if a person employs another really either on week work or piece-work according to the specified rates, it is

no offence on his part honestly to dispute his liability to pay more or less to the person whom he employs. If he succeeds in his dispute he defeats the claim; if he loses, the person employed is entitled to what is the true rate. He is entitled to dispute his liability on what appears to him a lawful ground—though it may turn out wrong; but because a person sets up a defence which turns out wrong, it does not follow that he is guilty of a crime. The Act provides nothing of that sort, but only in cases where he intends to evade the Act. To come within the mischief of the Act he must pretend to make a contract with another person for a less rate than the Act provides; it does not matter whether that pretence takes effect in engaging a person at the beginning of the contract or at the end. If a less sum is given in discharge of the contract that would be wrong; it would be just as much an offence as if they had agreed in the first instance to do so. The evidence in this case shows that the girl was at first engaged at weekly wages at the log rate, and had been paid for a time at 1*l.* per week. In the beginning of the week in question, on the Tuesday, the employer got the agreement back, and thinking she was not doing her work fast enough to earn the 1*l.* per week, determined himself that she should be employed at piece-work, and noted it in the book. She was no party to this, and being no party, this would not constitute a contract binding her. He then tendered her what was the piece-work price appearing in the book, which was 18*s.*; then the prosecution took place. He contended that his view was right; that as the girl could not work fast enough for weekly wages he had engaged her at piece-work and that that amounted to 18*s.*, and the book was shown to the girl, who then said that she had done work to the trousers other than the work mentioned in the book itself. He said that he did not know of that. The justices thought rightly that the contract set up by the defendant was not binding on the girl because it was made in the middle of the week and could not affect that week. In addition to that they found that the employer entering something in her book to which she did not give her acceptance did not amount to a contract, and that even if she were

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employed at piece-work she would be entitled to an extra amount, and they convicted the defendant. They manifestly proceeded on the view that if the employer set up a claim which fails as a defence to the contract alleged by the *employé* that in that case he is guilty of an offence. That is clearly wrong. He is entitled to defend himself against a claim by any means he honestly believes to be a defence. If he fails he has to pay the rate claimed, but so long as he has in his mind an honest belief in the existence of the contract which he sets up, then if he has paid less, not in pursuance of a contract which the Board thinks fixes an improper price, but has paid less because he thinks he is lawfully entitled so to do, he is not liable to be convicted. If the justices came to the conclusion upon proper evidence that the defence amounted to a mere trick to defeat the Act the offence could be complete. The evidence here does not warrant this assumption.

The order will be made absolute, with costs.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitor for defendant: *W. H. Lewis*.

W. H. M.

F.C.

FALKINGHAM AND OTHERS v. THE VICTORIAN RAILWAYS COMMISSIONERS.

1898

March 29, 31.

Arbitration—Railway contract—Penalties for delay, deduction of—Action on award—Award bad in part—Non-referable items, consideration of by arbitrators.

By a clause in a railway contract it was provided that for every day's delay after a certain day fixed for the completion of the contract the contractors should be liable to the Railways Commissioners in a sum of 15*l.* per day. It was further provided in the same clause that there should be no interference in the operation of this condition unless the Engineer-in-Chief by writing suspended the running of the time fixed or allowed some remission of the fine and unless and until the Engineer-in-Chief should so act by writing as aforesaid, the contractors should not be relieved from their liability for such penalties, nor should the Commissioners be deprived of their right to deduct or set off such penalties. By another clause it was provided that "all matters" left to the decision of the Engineer-in-Chief, and "all claims and demands of every kind . . . by the corporation against the contractors under or arising out of the contract" should be left to the determination of the Engineer-in-Chief subject to the right of the parties if dissatisfied with such determination to proceed to arbitration in a certain way.

Held, that the right of the Railways Commissioners to deduct or set off penalties arising through delay in completion of the contract was absolute, and was not subject to the clause providing for arbitration.

Where arbitrators have made a bulk sum award, and it appears upon the face of the award that they have decided upon a matter which was non-referable, and where it also appears from the details of the particulars furnished by the contractors that non-referable items have been considered by the arbitrators, the whole award is bad.

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APPEAL from judgment of Madden, C.J. (23 V.L.R., p. 408).

This was an appeal on behalf of the plaintiff from portion of the judgment of Madden, C.J., whereby the defendants were allowed to set off the amount of penalties for delay in constructing the railway line. There was also a cross-appeal by the defendants against that portion of the judgment whereby the plaintiff was adjudged to be entitled to the amount of the award found in his favour. The facts of this case are fully set out in the report of the case before Madden, C.J. (23 V.L.R., p. 408).

Mitchell (with him *Lewers*) for the plaintiff in support of the plaintiff's appeal—The award has been determined by the Chief Justice to be a valid award, and the question is, how far had the arbitrators jurisdiction to deal with the penalties sought to be deducted by the defendants under clause 85 of the contract. By clause 87 the arbitrators have clearly jurisdiction to deal with delays of a certain kind, and they have impliedly jurisdiction to deal with penalties for delays in the non-completion of contract when such delays have really been caused by the acts of the defendants. Clauses 85 and 87 must be read together, and by the latter clause "all matters left to the decision of the Engineer-in-Chief and all claims and demands of every kind of the corporation against the contractor under or arising out of the contract" are within the jurisdiction of the arbitrators. In construing the language of any of the clauses you must regard the language and object of the whole contract, and though clause 85 provides that the corporation is not to be deprived of its right to deduct or set off these penalties, that provision is subject to the wider language dealing with appeals by way of arbitration. If the contractor, as he undoubtedly is, is entitled to recover damages by reason of the delay on the

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part of the corporation in delivering permanent way materials, it would be quite inconsistent with the object of clause 87 to allow the corporation to recover or set-off penalties for delay in non-completion of the line when such delay has arisen through its own default; the contracting parties could never have intended that the right given by one clause should be completely destroyed by another. The construction urged by the defendants enables them to gain an advantage by their own wrong. If the defendants caused the delay, as the arbitrators have found, it would create an injustice to allow them to charge the plaintiff for such delay. The word "matters" in clause 87 seems to be used in distinction to the words "claims and demands," and this deduction by way of penalties is clearly a "matter" arising out of the contract.

Box and *Bryant* for the defendant respondents were not called upon.

The judgment of the Court (WILLIAMS, HOLROYD, and HODGES, JJ.) was delivered by WILLIAMS, J. We think that the view taken by the Chief Justice in the Court below was correct, that the corporation has an absolute right to set off these penalties excepting in one event—viz., that the Engineer-in-Chief, having inquired into the detention, may, if he think it sufficient, suspend the imposition of the deductions or sets-off, and allow by writing under his hand such extension of time and such money compensation as he may think adequate. The words at the end of this clause 85 are very strong: "the contractor shall not be relieved from his liability for such liquidated damages nor shall the corporation be deprived of its right to deduct or set off the said damages under this condition," unless and until the Engineer-in-Chief allow such extension by writing under his hand. There are two prohibitions—first, that the contractor shall not be relieved of his liability for damages; and the second, that the Commissioners shall not be deprived of their right to set off the damages. The clause does not say, as it might have said, that it is to be subject to the qualification of the 87th clause, giving the right to arbitrate; it does not say

"subject to the provisions hereinafter contained," or "subject to the provisions of clause 87." We think that clause 87 may be read quite consistently with clause 85. The appeal will therefore be dismissed with costs.

The cross-appeal by the defendants now came on for argument.

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Boz (with him *Bryant*) for the defendant appellants—The award is bad, inasmuch as the arbitrators have entertained and considered non-referable matters, and as the award is a "bulk sum award" the whole award is bad. There were seventy-five items referred, and portion of one only out of all those items is referable. This case was argued before the Full Court upon a former award (a), and though the Court then in its judgment pointed out that non-referable items had then been entertained, the arbitrators have in this their second award given the same large amount to the plaintiffs. If the items be looked at it is apparent at once that non-referable matters have been dealt with.

Counsel then dealt with the facts of the case.

The arbitrators awarded the costs of the proceedings to be paid by the defendants, although the proceedings took twenty-eight days, and although admittedly there was only one referable item dealt with in the proceedings, while the rest of the time was occupied over non-referable items, if the arbitrators had been considering this one item only they would not have ordered the defendants to pay the costs incurred in the consideration of the seventy-four items upon which they were successful.

Counsel referred to the following cases:—*Watson v. The Board of Land and Works* (b); *Fitzgerald v. Graves* (c); *Barnes v. Braithwaite* (d); *Roberts v. Eberhardt* (e).

Mitchell (with him *Lewers*) for the plaintiff respondents—This award upon its face is good, and the Court will not go into extrinsic evidence to see whether the arbitrators have dealt with

(a) [1895] 21 V.L.R. 9.

(d) [1857] 2 H. & N. 569.

(b) [1897] 23 V.L.R. 421.

(e) [1858] 28 L.J. C.P. 74, p. 77.

(c) [1814] 5 Taunt. 341.

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matters not referable: *Duke of Buccleuch v. Metropolitan Board of Works* (f); *O'Rourke v. Commissioner for Railways* (g).

[HODGES, J. When an award is bad upon one point, is not the presumption as to its validity gone altogether?]

Not when, as in this case, the part of the award which is bad is separable from that which is good: *Re Feuron & Flinn* (h).

Box was not called upon to reply.

The judgment of the Court [WILLIAMS, HOLROYD, and HODGES, JJ.] was delivered by WILLIAMS, J. This is an appeal in the nature of a cross-appeal by the defendants from a judgment of the learned Chief Justice. The action was one brought upon an award of arbitrators in favour of the plaintiffs, and the Chief Justice, after hearing the case, ordered judgment to be entered for the plaintiffs for 19,076*l.*, and for certain costs, subject to a set-off amounting to 18,881*l.* 18*s.* 3*d.* Against that judgment the defendant has appealed, and the principal ground of appeal, apart from the question of costs, is that it is manifest that the arbitrators in making their award have made it upon matters which were not referable. Clause 87 of the Conditions of Contract shows what matters are referable to the arbitrators for their decision, where the contractors are dissatisfied with the decision of the Engineer-in-Chief, and those matters, and those matters only, that are mentioned are referable. It has been admitted here and before the learned primary Judge that of all the items, some seventy-six in number, as to which the plaintiffs were dissatisfied with the certificate of the Engineer-in-Chief, and which they sought to have referred to the arbitrators, only one was referable. Now the defendants contend that it is manifest that the arbitrators have not confined their award to that one item which was referable, but must have included in their award items which were not referable. This matter has been before the Court before, when very much the same objection was taken. On appeal from my brother Hodges the Full Court held the award to be bad upon one ground, and

(f) [1871] L.R. 5 E. & Ir. App. 418. (g) [1890] 15 A.C. 371.

(h) [1869] L.R. 5 C.P. 34.

the members of the Court went out of their way, so to speak, to express their opinion upon another ground, and very nearly went the length of holding the award bad upon that other ground. The Court said :—" But apart from the reason we have mentioned there are, it appears to us, very strong and almost irresistible grounds for forming the conclusion that in dealing with item 66 (admittedly a referable item under the heading which it bears) the arbitrators have, in assessing the amount of damages at 20,500*l.*, gone into a mass of matters which they were not entitled to take into consideration." The Court then referred to clause 89 of the conditions, which provides that the contractors shall furnish full particulars of their claims, and shall be bound by these particulars when delivered, and after stating that the contractors delivered those particulars and also gave particulars of their claim under item 66, the Court then proceeds :—" They head it thus : ' Loss through department not giving possession of various parts of the line within one month after contract was signed, from 25th January 1887, to 8th August 1891.' They then give particulars as to how they make up under this item their claim of 30,625*l.*, and then proceed :—' Herein is given some of the *principal* stoppages and hindrances under which we claim as above'—that is, under which we claim losses to the extent of 30,625*l.* They then set out in detail particulars of the *principal* stoppages and hindrances, eleven in number. It appears to us that not one of those principal stoppages and hindrances which form the basis of their claim to 30,625*l.*, under item 66, can be considered as ' not giving possession of various parts of the line ; ' or, in the words of condition 87, as ' failing to give possession of the ground after thirty days from the date of the execution of the contract,' though the last but one in the list of principal stoppages and hindrances would be referable under ' failing to provide permanent way materials as provided by the contract,' condition 87. These facts raise in our minds a very strong presumption that in dealing with this claim of the contractors for 30,625*l.* the arbitrators must have considerable claims for stoppages and hindrances which could not be considered as ' failing to give possession of the ground,' and only one of which was referable, and

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then under a different claim, viz., 'failing to provide permanent way materials,' especially when we bear in mind that by these particulars the contractors are bound, and that they cannot travel outside them. This case is an illustration of the necessity that exists for the exercise of care on the part of the contractors to submit only such claims to the arbitrators as are clearly referable under the contract, and also of how necessary it is for arbitrators, where claims are submitted in the careless and wholesale manner in which they have been submitted in the present case, in making their award, to make it clear that they have only dealt with matters which they have jurisdiction to entertain."

In addition to the facts mentioned there it is necessary to add very little. The first point on which we desire to make an observation is, that even now, assuming the decision of the Full Court in the appeal on behalf of the plaintiffs to be correct, the award before us shows on its face that the arbitrators have dealt with a matter not referable. The first award of the arbitrators dealt with a matter of 1,423*l.* 18*s.* 10*d.* with which they had no authority to deal. Though that defect has been removed on the second award, it now appears, looking at the award, that the arbitrators have dealt with a matter which is not referable. That being so, the presumption that, where an award professes to be made in respect to matters referable, and the arbitrators proceed to award in general terms, the award which the arbitrators have made in respect of matters referred is removed. When it appears on the face of the award that the arbitrators have decided on matters clearly not referable, then we think that the presumption goes. Then if we look at the evidence that they have taken upon themselves jurisdiction to award upon matters not within their jurisdiction, and at the other evidence in the case, and bearing in mind the previous judgment of the Court, we are necessarily and irresistibly forced to the conclusion that the arbitrators have made their award in respect of matters many of which were not referable. Mr. Box has argued that, if the original claim of the contractors for 15,000*l.*, for not giving possession of the ground on which the railway was to be made within one month after the contract was signed, were an honest claim, even though they amended

the claim to 30,065*l.* 10*s.* afterwards, by including a claim for not delivering permanent way material, then the difference, 15,065*l.* 10*s.*, is allocated to what is admitted to be the only referable matter, viz., the non-delivery of permanent way material. Instead of that the arbitrators have awarded over 19,000*l.*, and upon that basis they must, to the extent of some 4,000*l.*, have given this award in respect of a non-referable matter. Then it appears that at the original hearing before the arbitrators, in the twenty-eight days' sitting, though Mr. Singleton very resolutely objected to the arbitrators going into any other matter than the one item, No. 66, and kept repeating that objection as each item was gone into, the arbitrators went on taking evidence on all the items. Then the chairman said that he was going under the submission as made under protest, that if he had to go under the submission, as in the contract, he would have to close his book. It appears that he was not therefore going under the submission in clause 87 of the contract. There is also this to be borne in mind—it is not unimportant: we are trying to ascertain what the arbitrators did—that the Court on the previous occasion, although not going the length, which it could not with propriety do, of saying expressly that the arbitrators were only to make their award with respect to one item, strongly recommended them to do so. Instead of doing as they were admonished by the Court to do, the arbitrators make their award in the same general terms as before. They knew there was only one item referable, and therefore they should have said that they awarded in respect of that one item, and yet they did not do that, notwithstanding the admonition of the Court. We think the arbitrators have exceeded their jurisdiction, and have made an award in respect, it may be, of matters referable, it may be in respect of matters not referable. The cross-appeal will be allowed with costs, the judgment of the Chief Justice be reversed, and judgment will be entered for the defendant on the claim, with costs to be taxed.

Solicitors for the plaintiffs: *Rogers & Rogers.*

Solicitors for the defendants: *Guinness*, Crown Solicitor.

W. H. M.

F.C.

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Williams, J.

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June 15.

Madden, C.J.

THE QUEEN v. AUSTIN AND OTHERS.

Administration and Probate Act 1890 (No. 1060), s. 115—Duty payable on property conveyed in evasion of Act—Parties chargeable with duty—Non-liability of executors for duties on property which never vested in them—Executors.

An executor cannot be sued for the payment of probate duty on properties alleged to have been transferred by the testator with intent to evade the provisions of Act No. 1060.

The proper parties to such a suit are those persons who hold the properties so alleged to have been transferred.

THIS was an argument upon a point of law raised in the pleadings before trial of the action.

An information was laid on behalf of the Queen against Stanley Austin, William H. Bullivant, and Joseph H. Grey as executors of the will of James Austin, claiming payment of additional probate duty to the amount of 20,000*l.*, payable upon properties alleged to have been transferred by the testator, prior to the making of his will, to certain persons other than the defendants, with the intent to evade the payment of duty under the *Administration and Probate Act 1890*.

The information set out the several conveyances, alleging that they were made voluntarily and with intent to avoid payment of the probate duty. The defendants, *inter alia*, in their defence objected "that, even if the allegations in the information be true, and even if the said conveyances and transfers were made by the said James Austin for the purpose mentioned, no claim exists and no remedy is available against these defendants as executors of the will of the said James Austin, as the payment of any duty claimed is enforceable against the property comprised in such conveyances and transfers respectively, and not otherwise, and they will further object that the various trustees, grantees, and transferees referred to in the said information are necessary parties to this action."

The argument upon the question of law thus raised came on by consent before Madden, C.J.

Box and *Topp* for the plaintiff—The claim is founded upon the right conferred by sec. 115 of the *Administration*

and *Probate Act* 1890, which makes provision to prevent evasions of the Act by voluntary conveyance of property (a). The first step is to find out who is the person primarily liable to discharge the debt to the Crown. The executor is first of all liable, and if the Crown cannot get the money from him then the Crown may enforce its rights against the property. By sec. 115 the property so transferred is to be deemed to form part of the estate of the testator; that is the presumption which the Statute enacts for the purpose of defeating these contrivances to evade duty. The properties are to be deemed part of the estate of the testator, and so the assumption is that the executor has control over them. Then by virtue of the provisions of sec. 101 a power of enforcing payment is given, and by sec. 102 the duty is made a debt of the testator, due to Her Majesty, and it "shall be paid by the executor" out of the personal estate of the testator, or if the personal estate be insufficient, then out of the real estate. Sec. 115 with a specific object in view enacts that these properties are to be part of the estate just as if they came into the hands of the executors, and the executor would have his right of indemnity over against the beneficiaries. The executors are the persons to follow the property and recover the duty: *Graham v. Graham* (b). There is no denial of assets.

Higgins and Hayes (with them *Cussen*) for the defendants—The action is for a debt due, but it cannot be said, until the properties have been proved to have been transferred as alleged, that the executors are the debtors, because it is only in that

(a) "Sec. 115. If any person has made or shall hereafter make any conveyance or assignment gift delivery or transfer of any estate real or personal or of any money or securities for money with intent to evade the payment of duty under this part of this Act in case such person should die the property comprised in any such conveyance or assignment or the subject matter of any such gift delivery or transfer shall upon the death of such person be deemed to form part of his estate for the purposes of this part of this Act upon which duty shall be payable under this part of this Act and the payment of the duty upon the value of such property may be enforced against such property in the same way as duty under this part of this Act is enforceable and as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed assigned given delivered or transferred. . . ."

(b) [1874] 5 A.J.R. 100.

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event that the properties are to be deemed part of the estate. The executors, however, are not and cannot be made liable as debtors; the remedy is against the property so transferred. The properties never pass to the executors; they have no control over them; they cannot make any valuations with respect to them, as they would be mere trespassers if they tried to inspect and value them, and thus it is impossible to fulfil the serious obligations of making a statement on oath as to the assets and liabilities as required by sec. 97. The provisions of sec. 102 plainly point to the duty being paid out of the true property of the testator, property comprised in the will, and do not refer to "artificial" property as under sec. 115. The power given by sec. 103 to executors to deduct the duty from each devise, bequest, or legacy cannot apply to property which never passed to the executors, and which never did and never can come into their hands. There is a distinct provision as to the "true" property, which is wholly inapplicable to the "artificial" property. In sec. 105 the Legislature refers to "the person by whom the duty might have been paid"—i.e., might have been paid in order to get his devise free from any burden, and sec. 115 may be read as referring to such a person who is ultimately responsible for this property as being the debtor. The statement required by sec. 108 could never be complied with by the executors in a case like this. In cases of transfers made years ago by the testator being made with the intent to evade probate duty, the executors, being ignorant of such transfers, might ultimately become responsible for a *devastavit*; they could never get at these properties. Sec. 112 clearly shows that the intention of the Act was that the person who gets the property is to pay the duty. Sec. 115 creates for the purposes of duty an artificial property: it is to be deemed to be part of the estate for the purpose of ascertaining the proper percentage chargeable. It is only in that one aspect that an executor could be made a party to a claim of this description; it may be that the duty payable upon the assets really in his hands may become liable to a higher percentage by the swelling of the total assets liable to duty through the inclusion of the value of these properties alleged to have been transferred. Sec. 115 carefully

avoids making the duty chargeable against any person, but points to a specific charge against the property itself. It omits any reference to a remedy against a person.

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Box in reply.

MADDEN, C.J. Undoubtedly this is a difficult Act to construe, and the question itself a difficult question; but I do not think that the matter would become plainer if I reserved my consideration of the case. The plaintiffs claim a declaration in their statement of claim that certain properties were transferred with intent to evade the payment of duty. (His Honor read the claim.) Therefore the statement of claim distinctly points at sec. 115 of the Act, and the claim is in respect of property referred to in it and in respect of a charge on such property created by it. The defendants, who are the executors of James Austin, and not the trustees or transferees of the properties referred to in the claim, object that there is no claim against them in respect of the matters referred to in the statement of claim; and, further, they say that the persons who represent the property alleged to have been transferred should be parties to this suit or action. It is said to be an action for debt, not in the ordinary sense as where a man says "You owe me so much money, pay it:" it is a precise and definite attack upon the properties, transferred, as is alleged, to evade the duty, in order to recover the duty which is assignable to them. I have therefore to arrive at the conclusion as to whether, as is contended, sec. 115 gives to the Crown the right to recover against the executors of the transferror's estate after his death the duty which is attached by that section to properties transferred in his lifetime with intent to evade the payment of such duty.

Assuming that the Legislature intended to act justly and fairly, unless there is a manifest expression of a contrary intention, it appears to me to be clear that the view of the defendants must be right. I think it may be said, for this purpose, that the Act consists of two phases—first, the everyday class of an estate which passes on the death of a testator into the hands of his representatives, and which has to be dealt with for the purposes

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of duty, and the provisions of sec. 97 plainly contemplate that the way the duty is to be got at is, that the executor shall render an account of those things which come to his hands and which he has a right to deal with; and the section contemplates that he shall make up a balance-sheet showing the assets and liabilities, and a balance is struck, and *prima facie* that balance is the subject matter of duty. There are various sections enabling the Master to check the valuations, etc., and finally the result is arrived at, and the balance in the hands of the executor is liable to duty. Then follow the clauses for enforcing payment when payment is not made. Under sec. 101, if the payment be not made, the Master may apply to the Court. (His Honor read the section.) Then followed sec. 102, which was much relied upon by Mr. Box as showing that this debt is to have priority over all other debts, and is chargeable in the first instance on the personalty and then upon the realty. If that section is examined it amounts to no more than this, that in reference to the duty it enacts the principle giving Her Majesty priority over other creditors, and secondly, it directs that it shall be paid out of personalty and in priority to other debts, but also charges it upon the realty in the hands of the executors. Then there comes the provision as to ordinary debts in sec. 103, which contemplates that whereas it may be more convenient to pay the debt out of personalty, yet in the result each devise, bequest, or legacy must bear its share, and the executors may make the requisite deductions therefrom. That is a mere equitable provision to enable justice to be done.

Then the next matter is the second phase. It is quite clear that as to sec. 112 a special and new class of case is provided for, and that where there has been a settlement of property after a certain date it shall be registered, and if not registered, then the Master may assess "in the prescribed manner the duty payable under this part of this Act in respect of such settlement and if such duty be not paid within the prescribed time or such further time after the prescribed notice the Master or any person interested may apply to the Court which may order that a sufficient part of the property included in such

settlement be sold and the proceeds of such sale applied in payment of the duty. . . .” Therefore it is clear what the Legislature had in view in that section, and this seems to make the defendants’ view of sec. 115 correct. That sec. 115 is not the only section including anything extraordinary or special, because there the Legislature has done the same thing in respect of settlements made with intent to evade duty as was done in respect of settlements under sec. 112, where, instead of leaving the matter in the hands of the executors, it makes the duty an express charge upon the property settled. Then if one looks at the literal expression of sec. 115 it seems, *prima facie*, plainly enough to show that the contention of the defendants is right. (His Honor read sec. 115.) The first thing that strikes one is that it is expressly declared that the demand of duty “may be enforced against such property.” Mr. Box challenged the use of the word “may,” and contended that it gave an option. I think the word “may,” where it gives jurisdiction, or where the context or the sense of the section requires it, means “must.” It is the only remedy given. It is clearly used in that sense. If such property shall be discovered, and is liable to duty, it *may* be enforced in this way—viz., against such property. That that is so is also strengthened from the fact that, in the same section, property which is the subject matter of a *donatio mortis causa*, which does not come into the hands of the executor, is made subject to duty, and the payment of that duty is to be enforced against such property in the same way as against any other property, that is to say, that a requisite portion shall be sold to realize the duty. Starting with that *prima facie* impression of the section, if one examines it on either side to see how it works out justice, as far as the Crown is concerned the only possible complaint which it could have to the defendants’ interpretation of the section would be that it would deprive the Crown of the right of resorting under sec. 102 to the payment of the duty out of the personalty. That, of course, might be a serious deprivation but for this fact, that the duty is to be ascertained on the valuation of the property transferred, and it is only a portion of that value which naturally would represent the duty,

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the value of the property would be so much and the duty, of course, would be of a less value, and there is, or would be, available to the Crown necessarily a sufficiency to pay the duty. Consequently it takes away nothing from the Crown, because the property is charged and there is the property available.

From the executor's point of view the result would be serious. First of all he would be bound to make a statement on oath of the property available for duty, and that, too, as to property as to which he has not the slightest right of access, and the provision as to liability of the property to duty is only to apply if the transfer was made with intent to evade the duty, and the executor could not possibly take it upon himself to say so unless he established it by suit. Therefore it would not be a subject matter which the executor would contemplate in making his statement in the affidavit. In the next place, as the particular property does not descend to him at all from the testator, but has passed to the transferee, the executor would be a mere trespasser if he sought to follow it, so as to arrive at its value for the purpose of making his affidavit. So that the executor is faced with an impossibility to start with. Next, looking at sec. 102, which is said to impose a duty upon the executor, as the transferred estate is to be deemed to be a part of the testator's estate for the purpose of duty, Mr. Box said that the duty is to be enforceable against such transferred estate as against any other property of the testator. Now consider how sec. 102 would operate; the duty payable is to be deemed a prior debt, and shall be payable by the executor out of the personalty, or if the personalty be insufficient, out of the real estate. The executor, therefore, may have to satisfy the debt out of the real estate. How can he do that out of an estate which he does not own and which he cannot touch? If he made a claim against such transferred property he would be defeated. I do not see how he could make such a claim. It does not concern him, and as he has not got it, and cannot get it, how can he satisfy the debt out of it? While it would be a debt against himself, and the only way to satisfy it is out of the real estate, he is precluded from touching that real estate, which never descended to

him. The only way it is alleged to be part of the testator's estate is that it is so for the purpose of the duty being paid. There is no machinery which vests such property in the executor in any way. The reasonable interpretation is that which the defendants put upon it; that in order to see the amount of duty chargeable the property is to be treated as belonging to the testator's estate. It would be impossible to construe sec. 102 as being incorporated into sec. 115, as the plaintiff contended for. Under the provisions of sec. 103, the general rule manifestly is that each devise, bequest, or legacy has to bear the duty in proportion to its interest in the estate, and in such adjustment the executor or representative shall deduct out of the assets the contribution of each contributory. As I have said before, where such transactions exist as alleged in this case, when transfers of property have been made to evade probate duty, the properties are not in the executor's hands. As his only remedy is to deduct the duty from the assets in his hands he could not give effect to or take advantage of the provisions of sec. 103 by any possibility. The property itself would never come into the executor's hands. All he could do would be to pay the duty. He never could deduct the share which he may have had to pay out of the personalty out of the lands mentioned in these challenged transfers. I think these matters show, as I have said, whichever way you look at it, that the only equitable and just interpretation of sec. 115 is that which the defendants contend for, and that the opposite contention would not only lead to impossibilities of compliance but to gross injustice. We find that in sec. 115 payment of the duty is to be enforced in the way I have before alluded to; that is, the same as in sec. 101. Sec. 101 is the only general section which provides for the enforcement of payment of duty, and that is the section which sec. 115 looks back to. In sec. 112 the same process of enforcement is expressly indicated. The effect of sec. 115 is to show, not that the property so transferred is to bear the whole burden of the duty that shall be paid out of the estate, but the particular proportion of the duty attributable to itself. I think,

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therefore, that every argument makes for the defendant's view.

Then the only question is what should I do upon this question of law? It is practically an objection to the further maintenance of the action against the defendants at all; alternatively it alleges that the claim is defective for want of necessary parties. I do not feel confident in saying that in no possible aspect could the presence of the executors be required upon the record. However, the plaintiff does not suggest that there is any ground outside the main point for so retaining them. That being so, I think I should hold that there is no remedy against these particular defendants for this specific debt. This is a distinct claim based upon the provisions of sec. 115, and it appears on the true interpretation of that section the holders of the properties and not the executors should be sued. The only decision bearing upon the issue is that of *Graham v. Graham* (c), and that only amounts to a dictum. It goes very much in the same direction that I now propose to take. I think the use of the expression of "a remedy *in rem*" in that case was more in a colloquial sense than in its strict legal sense: the remedy operates on "the thing" through the person who holds "the thing." First, the person pays the duty himself before the property is sold to realize the duty. I hold, therefore, that the action is not maintainable as against the executors, but only against the particular individuals alleged to hold the properties.

*Judgment with costs for the defendants
without prejudice to any other action
for duty payable by executors consequent
upon the estate being raised to a higher class of duty as a result
of any action against the transferrees
of the property.*

Solicitor for plaintiff: *Guinness*, Crown Solicitor.

Solicitors for defendant: *Taylor, Buckland & Gates*.

W. H. M.

(c) [1874] 5 A.J.R. 100.

HANTON v. FORBES.

Mines Act 1890 (No. 1120), s. 32—Cancellation of registration of residence area—Jurisdiction of warden to hear application—Registration of land exempted from mining purposes—Right of private individual to intervene.

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The warden has no jurisdiction under sec. 32 of the *Mines Act 1890* to entertain an application by the holder of a miner's right to have the registration of a residence area cancelled on the ground that the land is excepted or withheld from mining purposes by an Order in Council.

The Crown is the only party who can take steps for the cancellation of such registration.

SPECIAL CASE stated by the warden of the goldfields at Bendigo.

A summons was issued by Hercules Hanton against Eliza Forbes, whereby Hanton sought, by virtue of his miner's right, to have it declared that the defendant's registration of a residence area was registered in contravention of the provisions of the *Mines Act 1890*, such contravention being that the land so registered is reserved for site for a public building by Order in Council gazetted 5th January 1872, in pursuance of the provisions of the *Land Act 1869*, and also excepted or withheld from occupation for mining purposes or for residence or business under any miner's right or business license by Order in Council gazetted 16th April 1886, in pursuance of the provisions of the *Land Act 1884*, and he further sought to have the registration of such residence area cancelled. When the case was called on before the warden the defendant took a preliminary objection that the warden had no jurisdiction to hear the case. The complainant requested the warden to state a special case, and he refused so to do, and the complainant then obtained an order *nisi* directing the warden to state a case. This was made absolute, and the warden accordingly stated this case.

The following facts were admitted by the parties:—The complainant is the holder of a miner's right; the land, the subject of these proceedings, is part of the land reserved as a site for public buildings by Order in Council gazetted 5th January 1872, and is also part of the land excepted or withheld from occupation for mining purposes or for residence or business under any miner's right or business license, by Order in Council gazetted

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16th April 1886, and is still so excepted or withheld. That T. Forbes registered a business license on 16th November 1871 affecting the said land, and occupied the said land until his death in 1896. No further registration took place until 16th April 1890; that on such last-mentioned date T. Forbes, being then the holder of a miner's right, registered the land as a residence area. On the 7th March 1891 T. Forbes transferred his interest therein to M. Barnett, who, as trustee for T. Forbes, registered a renewal on the 7th March 1892. No further registration took place until 17th June 1896, when Barnett transferred his interest to the defendant Eliza Forbes, the widow and legal representative of T. Forbes. Eliza Forbes registered the necessary renewal to keep the residence area on foot to the present day. The questions for the opinion of the Court were:—(1.) Has the warden jurisdiction to hear and determine the above suit? (2.) Did the defendant obtain such registration in contravention of any of the provisions of the *Mines Act* 1890, or of any by-laws of the mining district in which such area is situated? (3.) If question 2 be answered in the affirmative, is this such a registration that the warden can cancel, under and by virtue of sec. 32 of the *Mines Act* 1890?

The special case now came on for hearing before Madden, C.J.

Roberts for the complainant—By sec. 32 of the *Mines Act* 1890 general jurisdiction is given to a warden to cancel registration—(a) upon proof that the person registered as the holder is no longer the holder of a miner's right; (b) that such person has obtained such registration in contravention of any of the provisions of this Act or of any by-laws of the mining district. The registration in this case was in contravention of the provisions of secs. 15, 16, and 17 of the Act. The lands have been exempted from mining purposes, and no registration can be allowed.

[MADDEN, C.J. That may be a matter for the intervention of the Crown, but you have no interest which confers any right upon you to interfere.]

The provisions of sec. 32 are general, and there is no limita-

tion. In *Wakeham v. Cobham* (a) the fact of the Crown lands being temporarily reserved did not deprive the warden of jurisdiction. The complainant does not apply to be put into possession; he applies to have the registration cancelled on the ground that it was obtained in contravention of the Act.

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H. Barrett for the defendant was not called upon.

MADDEN, C.J. It is somewhat difficult to answer the questions as stated. As to the first question asked, I am of opinion that under the circumstances disclosed in the special case the warden has no jurisdiction. But I think he has jurisdiction to hear a wrong application, and to hold it to be wrong. A wrong plaintiff invokes the general jurisdiction which the warden has, and I think the better answer to give is to say that in my opinion generally under sec. 32 the warden has jurisdiction to hear and determine an application at the instance of a person entitled to make it for the cancellation of the registration of a residence area, and that in this case he would have such jurisdiction if the plaintiff had any right to institute the suit, but that as the land is Crown land permanently reserved, as stated in the case, for public buildings, and also is land excepted and withheld from mining purposes under a miner's right or business license, the plaintiff has no right in this case to raise the question of the wrongful occupation or wrongful registration of the defendant. The right which a miner's right gives to the plaintiff is merely to occupy for mining or residence purposes a portion of unoccupied Crown lands, and that right does not give him any authority to adopt the legal rights of the Crown. In this case he himself could have no right to occupy this particular residence area if the defendant were got out of it. He has personally no interest whatever in the wrongful occupation of that site by the defendant, and therefore it appears to me that he has no lawful right to complain of the wrongful occupation. It is a matter for which the Crown only can be a plaintiff, and therefore the application of the plaintiff is wrong. This view is supported by the decision in *Osborne v. Morgan* (b).

(a) [1870] 1 A.J.R. 93.

(b) [1888] 13 App. Cas. 227.

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In answer to the third question I say it is not such a registration as the warden can cancel, whether good or bad, at the instance of this plaintiff. As to the second I shall merely say that it is unnecessary and undesirable for me now to answer that question, because the facts are neither admitted nor are they clearly before me in such a manner as would enable me to deal with it.

Questions answered accordingly, and the plaintiff directed to pay the defendant's costs.

Solicitor for plaintiff: *Roberts.*

Solicitor for defendant: *Murphy.*

W. H. M.

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May 5.

A'Beckett, J.

BROCKLEBANK v. RYAN.

Land Act 1890 (No. 1106), s. 127—Proclamation forbidding cutting timber on Crown lands—Mining lease—Lands held under mining lease—Powers of cutting timber given by lease.

By sec. 127 of the *Land Act 1890* power is given to the Governor in Council to forbid by proclamation the cutting of timber under certain dimensions from Crown lands although a person may be duly licensed or otherwise authorized so to do.

Land held by a lessee under a mining lease from the Crown is Crown land within the meaning of such a proclamation.

Semle, the powers conferred by such mining lease are not nullified by the terms of such a proclamation.

Where a clause in a mining lease giving power to cut timber for mining operations and for domestic purposes is followed by a clause forbidding the cutting of timber of less than certain specified dimensions, the former clause is limited by the effect of the latter clause.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of the Court of Petty Sessions at Moonambel. An information had been laid by John G. Brocklebank against Thomas Ryan for cutting live timber from Crown lands which at a height of two feet from the ground was of less diameter than twelve inches. The Court of Petty Sessions dismissed the information, and this order was taken out to review such decision on the following grounds:—
(1.) That there was no evidence that the timber or sapling cut

was within the limits of the land leased to the Surprise Gold Mining Company. (2.) That the prohibition contained in the proclamation of the Governor in Council in the *Government Gazette*, 1890, p. 3857, overrides or nullifies any license or authority granted to such company by the lease put in evidence to cut timber of the size and dimensions prohibited by the said proclamation. (3.) That there was no evidence that the timber or sapling cut was so cut for any mining operation authorized by the said lease or for the domestic purpose of any person residing on the land subject to such lease. (4.) That the justices erroneously construed clauses 15, 16, and 17 of the said lease. (5.) That on the proper construction of the lease there was no power or license under the said lease in or to the said company or its servants to cut timber of the size and dimensions appearing in the evidence. (6.) That the evidence disclosed a breach by the company or its servants of clause 17 of the lease.

It appeared from the evidence that the informant was a Crown lands bailiff, and proceeded against the defendant, who was a servant of the Surprise Gold Mining Company, for cutting timber of the size mentioned above. A proclamation was produced and put in evidence purporting to be made under the provisions of the *Land Act* 1890, declaring that "no person although he be duly licensed or otherwise authorized shall cut or remove timber which at a height of two feet from the surface is of a less diameter than eighteen inches on or from the Crown lands in the undermentioned parishes." The parishes were duly set out, and included the parish in which the act complained of was done. Evidence was given that the defendant had cut a sapling on Crown lands, and that the sapling was only seven inches at two feet from the ground. The defendant told the informant that he was cutting the sapling under instructions from the manager of the Surprise Gold Mining Company. The defendant produced and put in evidence the mining lease granted to the company. The land on which the sapling was cut was within the area included in the mining lease. The manager of the company stated that he directed the defendant to get some props of a particular size for

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the mine; it was admitted that the sapling was under twelve inches in diameter. The lease by clause 15 provided that the lessee "shall not nor will cut any timber on the said land except for the mining operations hereby authorized and for the domestic purposes of those residing on the said land." By clause 17 it was provided that the lessee "shall not nor will cut or remove or permit to be cut or removed from the said land any live trees which at the height of three feet from the surface of the ground are of less diameter than twelve inches and shall not nor will remove or permit to be removed bark from such trees." The defendant justified the cutting of the tree under the terms of the lease, and also contended that the lands comprised in the lease were not Crown lands within the meaning of the proclamation. The justices dismissed the information, saying:—"We have heard enough of this case, and are unanimous that there is no case. We are of opinion that clauses 15 and 16 of the lease give the company power to cut any timber for mining or domestic purposes, and that clause 17 does not restrict them, except where the timber is cut for the purpose of sale." The informant then obtained this order *nisi* to review such decision, upon the grounds hereinbefore stated.

Cussen to show cause—Land held under a mining lease is not Crown land within the meaning of the section: *Essendon v. Blackwood* (a). In that case the Privy Council regarded the Crown as having a reversion only, and as being no longer the present and immediate owner. That view is borne out by sec. 2 of the *Land Act* 1890, where it is provided that "nothing herein contained except where otherwise expressly provided shall affect alter or repeal the *Mines Act* 1890." Under the *Mines Act* power is given to grant a lease for the purposes of mining. "Purposes of mining" must include cutting timber. A Crown lands bailiff has no right to interfere with a mining lease, and the proclamation has no effect within the area comprised in the mining lease. Where a lease is granted over Crown land it ceases to be Crown land: *Reg. v Dickenson* (b).

(a) [1877] 2 App. Cas., p. 583.

(b) [1888] 14 V.L.R. 732.

Paul to move the order absolute was not called upon.

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A'BECKETT, J. The prosecution in this case was for the breach of a certain proclamation prohibiting the cutting down of trees of certain dimensions. The proclamation was made under the *Land Act* 1890, sec. 127, and it declared that no person, although duly licensed or otherwise authorized, should cut dead or live timber of a particular description from such portions of Crown lands named in the proclamation. That prohibition extended over the whole parish. The question is whether land included in a mining lease is exempted from the operation of such a proclamation—that is, whether it is Crown land within the meaning of this power. I think that, considering the power under which a mining lease is granted—that is, the statutory power and the limited rights which such power gives—that the land included in a mining lease is Crown land within the meaning of this authority given to issue a proclamation under sec. 127, and it is within the area designated by the proclamation. I think the case to which I have been referred, in which doubts were expressed by the Privy Council as to what should be considered Crown lands under another Act, is no authority as to the construction to be put upon that section which authorizes the issue of such a proclamation. So that I have in the first instance to deal with a valid proclamation, giving valid directions as to the land comprised under this mining lease. I hold that the proclamation is operative so far as the area goes over the area comprised in the mining lease given by the Crown. I think that the provisions of the Crown lease and the authority given by such lease would override any restrictions which the proclamation purported to create; and if I thought that the lessor or the servant of the lessor (as in this case) was exercising the authority given by the lease, I should have no hesitation in saying that the magistrates were right. The magistrates thought that the defendant was doing only that which the lease authorized him to do. They took the same view as to the effect of the proclamation as I do; they do not say that this land is held under a mining lease, and therefore there is no offence; but they say that the lease authorizes him to do what he was doing

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and they distinctly relied, in giving their decision, on the terms of the covenants contained in the lease. I think they erroneously construed the covenants of the lease. I think that clause 17 is a general restriction applicable to timber which might be cut under clause 15. Under clause 15 the lessee may cut timber for mining operations and for domestic purposes; then clause 17 says that he is not to cut or remove timber of certain dimensions. I think this latter clause is a limitation upon the general authority given by clause 15. I understood Mr. Cussen to say that he was not prepared to combat that as a matter of construction; but independent of any concession in argument, it is my view that clause 15 does not give a general right, but is subject to the limitation of clause 17. That being so, the decision was wrong, and I make the order absolute, with costs.

Order absolute.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitors for defendant: *Moule, Hamilton & Kiddle* (for *E. S. Herring*).

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HODGSON v. COLLIER.

Crimes Act 1890 (No. 1079), s. 102—Possession of stolen wood, posts, etc.

By sec. 102, if any post, etc., be found in the possession of any person or on the premises of any person with his knowledge, and such person being summoned before a justice shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justices forfeit and pay over and above the value of the article so found any sum not exceeding two pounds.

Held, that the words "came lawfully by the same" mean "came honestly by the same."

The defendant employed a contractor to put up a fence for him. The contractor in erecting the fence took posts belonging to the prosecutor; and subsequently the prosecutor called upon the defendant and demanded the return of the posts or the price thereof. The defendant refused to return or to pay for the posts. The prosecutor then proceeded under sec. 102 of the *Crimes Act 1890*. The defendant in his evidence stated that he had no knowledge where the posts came from. The justices convicted the defendant and ordered him to pay the price of the posts.

Held, that upon these facts the defendant was improperly convicted.

ORDER TO REVIEW.

This was an order *nisi* to review the decision of justices at

St. Arnaud. The defendant Collier was proceeded against under sec. 102 of the *Crimes Act*, on the ground that he was found in possession of certain posts belonging to the informant Hodgson. It appeared that Collier employed a contractor named Smith to put up some fencing on his land. Smith apparently took some posts belonging to Hodgson, and used these posts in the fencing of Collier's land. Subsequently Hodgson came to Collier and told him that some of the posts thus erected were his, and demanded their return or payment for the same. Collier refused to return them or to pay for them. Hodgson forthwith proceeded against Collier under sec. 102 of the *Crimes Act*. The evidence is reviewed at length in the judgment, but it may be added that Collier in giving evidence stated that he knew nothing about the posts or where they came from. The justices convicted the defendant, and ordered him to pay the price of the posts. The defendant obtained an order to review this decision, upon the ground that the evidence proved that he had come lawfully by the posts, and could not therefore be convicted under sec. 102.

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Cussen to show cause—The evidence is clear that the defendant had posts in his possession which he did not come lawfully by. "Lawfully" does not mean "honestly." As soon as the demand was made the defendant should have returned or paid for the posts; he retains possession with the knowledge that they are the property of another, and as he had no legal title to them he comes clearly within the mischief aimed at by the section (*a*). This section was taken from 43 Eliz., c. 7, and the object of that old Act would seem to indicate that "lawfully" meant "a good title." The onus is clearly cast upon the defendant to satisfy the justices that he came lawfully by the same: the question is not whether the justices *ought* to have been satisfied, but rather whether they were satisfied.

(a) "Sec. 102. If . . . any post . . . being of the value of one shilling at the least shall be found in the possession of any person with his knowledge and such person being taken or summoned before a justice shall not satisfy the justice that he came lawfully by the same he shall on conviction by the justice forfeit and pay over and above the value of the article . . . so found any sum not exceeding two pounds."

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Starke to move the order absolute—The word “lawfully” means “honestly;” the heading of the subdivision of the Act in which this section is placed is “larceny of things attached to or growing on land,” and the object of the Legislature was to provide a summary method for punishing dishonest dealings. The essential ingredient is that the property must be found in his possession “with his *knowledge*;” the *knowledge* refers to the dishonest acquisition, not to an acquisition without knowledge of any dishonesty and subsequent information being given when the property is already in his possession which would tend to show that the property was in reality the property of another. “Knowledge” means “guilty knowledge.” The defendant was not called upon to show a lawful excuse until the informant had established his case, which he failed to do. The evidence is clear that the defendant in the ordinary course of business employed a contractor to put up the fencing. It is not alleged that he did not pay a full and proper price for the posts, and there is no suggestion that there were any circumstances which could have or should have aroused the defendant’s suspicions as to the contractor’s honesty. There is no suggestion of any criminal intent, and the justices were wrong in finding the defendant guilty of the offence.

A’BECKETT, J. This was an order *nisi* to test the validity of a conviction under sec. 102 of the *Crimes Act*, and it is necessary to look at the construction of that section to see what is necessary to a conviction.

Taking the subject matter of this prosecution, it provides that if a post is found in the possession of a person with his knowledge and he is brought before justices, he can be convicted and may have to pay over and above the value of the article any sum not exceeding 2*l.*, unless he satisfies the justices that he came lawfully by the same. The evidence required for the prosecution is of a very simple character, and it casts upon the person informed against the onus of showing that he came lawfully by the same. “Coming lawfully by the same” I think must mean, looking at the character of the offence and the framing of the section, that he came *honestly* by

the same. I do not think it should be read as meaning that he came by the property in such a way as to acquire a good title to the property. If a horse be substituted for the word "post" in the section, suppose a man was brought up for having a horse in his possession and he proved that he bought it honestly, and that there was no doubt in the minds of the justices before whom the case came that he had honestly bought it, he would have come honestly by the horse, although he would not have a good title to it, and he could not, in my opinion, be convicted under this section. It refers virtually to the defence of an honest acquisition of property. What appears to have taken place in this case was this: A man named Smith had, by means which were not lawful as against the owner, come into possession of a number of posts; Smith was employed by Collier to fence his land, and Smith put some of these posts in on Collier's land. The owner of the posts came to Collier and said, "Those are my posts and I must have them," and Collier refused to give them up. It does not appear that Collier knew or did not know when the demand was made upon him whether they belonged to the person claiming them or not, and he appears to have been indifferent in the matter, and thought that because he employed Smith and was ignorant of any property in Hodgson (the owner) that Hodgson's demand was an unreasonable one. Then Hodgson, being angry at this refusal, summoned Collier under this section. Under this section, assuming the evidence to be perfectly clear, as it was, Collier could not be convicted if he satisfied the justices that he had come lawfully by the posts. I should say if the facts were as I have stated, and there was no other fact beyond these, that he had come lawfully by the posts; that is, he employed a contractor and paid him, and that without his knowledge the contractor had used in fencing his land another person's posts. Mr. Cussen has argued that what is necessary to the defence is that justices should be satisfied upon that point and if I thought that there was any doubt in the minds of the justices as to Collier having been an accomplice of Smith, and being aware that Smith was fencing his land with another person's posts, I should say undoubtedly that the conviction ought to stand. But on the facts of the case, on all the

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probabilities of the case, and upon the way in which the case was opened, I feel no doubt in my own mind that the justices had no doubt that Collier's statement was true, and that they were satisfied as to that. Why I say so is this: the case was presented to them in this way, and the case for the prosecution as stated in Hodgson's affidavit did not pretend to throw any doubt upon Collier's statement, but rested the case entirely upon the fact of the identity of the posts as those in the possession of Collier, and which formerly belonged to Hodgson. In opening the case counsel referred to the fact that Smith had been convicted in another prosecution as to similar posts, and said that the 15 posts now claimed were taken by Smith from the same heap and placed in Collier's fence, and that the informant had formally demanded the posts from Collier; no question is directed to Collier as to whether he had any means of knowing that the posts which Smith was using belonged to someone else; there is nothing to suggest that he paid Smith less for them than the ordinary price. There is nothing to suggest that that point of view was brought before the justices. I do not think the prosecution intended to suggest that Collier was an accomplice of Smith's, or had reason to suspect that Smith was dishonestly obtaining the posts which he had contracted to put up. I deal with these facts at some length so that it may be distinctly understood that where there is a real doubt in the minds of the justices as to the essence of the offence it is not for the Judge to form a different opinion and to say that the evidence should have satisfied the justices. I do not think that the justices ever entertained the idea that Collier was an accomplice of Smith, and the view which I feel did satisfy them is not an absurd one at all. I do not attribute to them anything which can be called folly. I think they considered thus: this man's posts are found in Collier's land. They were quite sure about that; they were quite sure that before the summons was taken out Hodgson asked Collier to give them back or to pay for them, and that Collier was quite indifferent about the matter and did not trouble himself to go into the facts; and under those circumstances it would not be much to make Collier pay the penalty. That is the ground upon which they proceed, and I

think the order *nisi* should be made absolute on the second ground, which was added by Hodges, J.

Order absolute, with costs.

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Solicitor for informant : *J. L. Dixon* (agent for *Dunkley*).

Solicitors for defendant : *Hickford & Legge* (agents for *Gilfillan*).

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THE MELBOURNE TRAMWAY AND OMNIBUS COMPANY LIMITED,
APPELLANTS, AND THE MAYOR, ETC., OF MELBOURNE AND OTHERS,
RESPONDENTS.

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April 29,
May 12.

Hood, J.

Mandamus—Rates and rating—Justices Act 1890 (No. 1105), s. 139—Local Government Act 1890 (No. 1112), Part X., Division 7 (ss. 276-287)—Local Government Act 1891 (No. 1243); ss. 60, 61—Appeals against rates—Jurisdiction of County Court—Statement of case by Judge of County Court for determination by Supreme Court.

Notwithstanding the concluding words of sec. 60 of the *Local Government Act 1891* (No. 1243) a Judge of the County Court on the hearing of an appeal against the rating of an "undertaking" under Division 7 (2) of the *Local Government Act 1890* (No. 1112), as amended by the *Local Government Act 1891* (No. 1243) can be compelled by *mandamus* to state the facts specially for the opinion of the Supreme Court by virtue of the provisions of the 139th section of the *Justices Act 1890*.

Russell v. Shire of Leigh (5 V.L.R. (L.) 199) explained.

THIS was a rule *nisi* for a *mandamus* calling upon the learned Judge of the County Court (His Honor Judge Casey) to state the facts specially for the determination of the Supreme Court under sec. 139 of the *Justices Act 1890* in an appeal against the rating of the undertaking of the Melbourne Tramway and Omnibus Company Limited.

Under sec. 60 of the *Local Government Act 1891* the appellants had appealed against the valuation made upon their undertaking by the city of Melbourne. They had also made similar appeals against their rating by other municipalities. These appeals were consolidated, and on the hearing were allowed. Counsel for the respondents then asked the learned Judge to state a case for the opinion of the Supreme Court, but His Honor declined to do so, as he held he had no jurisdiction.

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The respondents then obtained a rule *nisi* for a *mandamus*.

The arguments are dealt with *seriatim* in the judgment.

The Attorney-General (Isaacs) (Bryant with him) to show cause referred to *Waterhouse v. Gilbert* (a); *Bryant v. Reading* (b); *Lyon v. Morris* (c); *Field v. Rimington* (d); *The Queen v. Hunt* (e); *Carter v. Mayor of Prahran* (f).

Box (Goldsmith with him) for the respondents other than the Mayor, etc., of Fitzroy, to move the rule absolute, cited *The Queen v. Bridge* (g); *The Melbourne and Hobson's Bay Railway Company v. The City of Richmond and the Borough of Sandridge* (h); *Russell v. The Shire of Leigh* (i).

Cussen and Kilpatrick for the Mayor, etc., of Fitzroy.

Cur. adv. vult.

HOOD, J. Upon the hearing of the above appeal the learned Judge of the County Court decided in favour of the Tramway Company, and being requested to state a case for the opinion of this Court, he refused to do so, on the ground that he had no jurisdiction. Thereupon this rule *nisi* for a *mandamus* was obtained in order to decide if this view of the learned Judge is correct.

By sec. 139 of the *Justices Act* 1890 it is provided that in any case of appeal the Court of General Sessions shall, if so required by any party to such appeal, state the facts for the determination of the Supreme Court. The *Local Government Act* 1890 gives to any person aggrieved by any rate an appeal to the Court of General Sessions. Secs. 60 and 61 of Act 1243 substitute, in such appeals, the County Court for the Court of General Sessions. The question therefore is, does sec. 139 of the *Justices Act* apply to appeals under the *Local Government Act* to General Sessions formerly and now to the County Court?

(a) [1885] 15 Q.B.D. 569.

(b) [1886] 17 Q.B.D. 128.

(c) [1887] 19 Q.B.D. 139; Fry, L.J.,
at p. 148.

(d) [1888] 5 *Times Rep.* 642.

(e) [1856] 6 E. & B. 408.

(f) [1889] 15 V.L.R. 228.

(g) [1890] 24 Q.B.D. 609.

(h) [1878] 4 V.L.R. (L.) 81.

(i) [1879] 5 V.L.R. (L.) 199.

It was said, first, that appeals against rates are really not appeals, as there has been no previous judicial decision to appeal from. But the Legislature has chosen to call them appeals, and has done so with full knowledge that there were in existence other statutes dealing with the procedure in appeals. These appeals thus come within the wording of sec. 139 of the *Justices Act*. Then do they come within the intention? On this I have felt some difficulty, but I have come to the conclusion that they do. For many years they have been so treated. I was referred to several cases, and have found others, extending down to 1892, wherein cases have been stated in rating appeals without any objection having been taken. This shows a consensus of opinion in one direction. Then the history of the legislation tends the same way. In considering this, I do not deem it necessary to go back further than the year 1865. At that time, by sec. 135 of the *Justices of the Peace Statute* 1865 (No. 267), the Court of General Sessions on appeals might, if it thought fit, state a case. The law as to municipal corporations was then regulated by Acts 27 Vict. (No. 176) and 27 Vict. (No. 184), passed in September 1863. Both of these Acts gave a dissatisfied ratepayer an appeal to the Court of General Sessions, whose decision was to be final and conclusive on all parties. As the *Justices Act* is later than the others, the power to state a case in appeals would, I think, extend to cases within the previous Acts: see *R. v. Bridge (k)*. So that in 1865 there were appeals to the Court of General Sessions against rates, and on these appeals a case could be stated for the determination of the Supreme Court. Then in 1874 was passed a new *Local Government Act*, 38 Vict., No. 506. So far as appeals are concerned, this Act is precisely what the former Acts were, and there is no hint at any intention to repeal the existing law. We next have in 1876 a change in the law as to General Sessions by the passing of Act 40 Vict. (No. 565). This Act clearly treats appeals against rates as being of a like kind to other appeals. It commences in sec. 23 to provide for uniformity in appeals to General Sessions. By sec. 26 is fixed the time for giving notice of appeal in every

(k) 24 Q.B.D. 609.

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case, except on appeals against rates, this being provided for by the *Local Government Act*. Sec. 27 defines the Court at which appeals shall be heard, and again specially names appeals against rates. Next follow several general provisions, and we find the Statute in sec. 36 again giving the Court of General Sessions the power of stating a case "in any case of appeal." It seems clear, therefore, that at that time this section, which deals with "any case of appeal," and which is contained in a procedure Act referring to rate appeals, and passed after the *Local Government Act*, must have applied to such appeals. The next legislation was in 1887. In that year the *Justices Act* was amended by 51 Vict. (No. 953), which is now in force as the *Justices Act* 1890 (No. 1105). So far as the present subject is concerned, no change in the existing law is expressly made. The Act is divided into parts, and Part VI. is headed "The Control of Superior Courts," and is in two divisions. The first division is called "Appeal." Under this division we have sections regulating appeals from Petty Sessions to General Sessions, though in sub-sec. 1 of sec. 128 there is a reference (apparently an oversight) to appeals against rates, again treating them as being in the same category as other appeals. The second division of this part is headed "Case Stated for Supreme Court and Order to Review," and under this we find sec. 139, which is a re-enactment of sec. 36 of No. 565, except that it is made compulsory on the Court of General Sessions to state a case instead of being merely permissive. There is not here, in my opinion, any indication of an intention to alter the existing law, or to remove rating appeals from this compulsory power of stating a case.

The next move in the law was the consolidation of the Acts in 1890, which makes no difference, and then in 1891 came Act No. 1243. This Act provides in secs. 60 and 61 for a transfer to the County Court of the jurisdiction previously existing in the Court of General Sessions with regard to rate appeals, and the decision of the County Court is made final and conclusive on all points. Apart from this last provision, I can find no suggestion that the County Court should not have the same power of stating a case as had been possessed by the Court of

General Sessions, and so far I think that appeals under these sections are included within sec. 139 of the *Justices Act*. It was, however, urged that the first portion of this sec. 139 shows that the whole section cannot extend to rating appeals. The contention was that the first part takes away *certiorari* in relation to appeals only from previous judicial decisions, and that the latter part relates to like appeals, and therefore could not cover appeals against rates. The original of this section is to be found in secs. 107 and 108 of 5 and 6 William IV., c. 60, the *Highway Act* 1835. This Act, after giving power to make a rate, provided an appeal, and made the decision on appeal binding and conclusive on all parties to all intents and purposes whatsoever. Then followed secs. 107 and 108, the former of which took away *certiorari*, and the latter enabled the Court to state a case. These sections are substantially combined in sec. 139 of the *Justices Act*, with the exception that the English sections expressly include rates, and *certiorari* is only taken away in reference to anything done in execution of that Act. So that under this *Highway Act* a case could be stated in rating matters, and that, too, although the decision of the sessions was conclusive. We have, therefore, our Legislature adopting a section which applied to rate appeals, and enacting it in a procedure statute (No. 565) which distinctly refers to appeals against rates. In my opinion, by so doing the Legislature intended that the section should still apply to such appeals, although the direct reference to rates was left out. This omission may have arisen from the idea that the reference to rates was superfluous, as *certiorari* would not lie in such a case, or from the view that in a procedure statute general words alone were needed. But, whatever the reason for the omission, I cannot think that the rating appeals are thereby excluded from the operation of the section. This view is supported by reference to the history of sec. 146 of the *Justices Act*, which enables the parties to an appeal to state a case to the Supreme Court by consent. This enactment first appeared in our legislation as sec. 34 of Act No. 565. That Act expressly refers in secs. 26 and 27 to appeals from rates, and when sec. 34 speaks of "any appeal" I think rate appeals were in-

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cluded. This sec. 34 was copied from the 12 and 13 Vict., c. 45, an Act to amend the procedure in courts of general and quarter sessions. Sec. 11 of that Act gives the parties to an appeal the power of stating a case in an appeal against any judgment, order, rate, or other matter, with certain exceptions. Our Parliament adopted that section but omitted the specific enumeration and also the exceptions, but instead thereof used general words and placed the section in an Act dealing with procedure in appeals which at that time must have comprehended appeals under the then existing municipal law. These various considerations support the conclusion that rating appeals are within sec. 139 of the *Justices Act* apart from the question as to finality of the decision of the Court of General Sessions.

Turning now to this point. Throughout the legislation as to rate appeals appears a desire that the decision of the appellate court should be final, and it has been suggested that the object was to prevent expense. Still, while the expression of the intention as to finality appears, there also appears an intention to allow a reconsideration of the decision by a case stated. The difficulty is to reconcile these apparently opposing views. It was pointed out by the Attorney-General in the course of a powerful argument that it is settled law that the decision of justices in petty sessions on appeals to them in rating matters is final on the questions over which jurisdiction is given to them; *Carter v. Prahran* (1). Then it was said that in like manner the decision of courts of general sessions should be final on questions left to them, and as these include both law and facts their decision is conclusive on all points. This seems strong, but I cannot think it to be correct. The decision of the petty sessions is only final on facts and not on law, and it is clear from several decisions that even if in finding facts the justices go wrong in law their decision will be set aside. It is extremely difficult to give a proper meaning to the words relating to finality, for in the one view argued before me the words are superfluous and in the other they are unusual, unreasonable, and often unjust. The latter contention, too, impliedly limits the operation of another

(1) 15 V.L.R. 228.

Act in cases where it would be expected that the Legislature, if such had been meant, would have used clear and unmistakable language. The history of the legislation is also against this view. If we go back beyond the date to which I have already referred, and look at Acts 16 Vict. (No. 3), 18 Vict. (No. 15), and 19 Vict. (No. 16), and the following Acts up to 1865, we find the creation of courts of general sessions by one series of Acts and appeals given to that court against rates by another series, and from the first it is stated that the decision on such appeal is to be final. Then subsequently a power, at first permissive but ultimately compulsory, is given to courts of general sessions to state cases for the determination of the Supreme Court, and not one word is said about such a power not extending to rate cases. There being no express restriction to this effect, it appears to me to be going too far to imply one. It seems more reasonable to hold that Parliament intended to make the decision of the Court of General Sessions, like that of the justices, final on the facts, but to leave questions of law open to review by the Supreme Court. Otherwise there would never be any uniformity of decision in rating matters. Each court of general sessions would be a law unto itself, and the rights of the parties would vary with the varying views of the respective courts, and, considering the important interests involved in the undertakings referred to in secs. 281-287 of the *Local Government Act*, I cannot think that the decision of the Court of General Sessions is final on points of law. I have felt that it is not easy to say that all questions of law and fact are to be referred to a court whose decisions shall be final, and, at the same time, give another court power to interfere. Yet this is clearly done in the *Highway Act* 1835, and the only distinction suggested between that and our legislation was that our provisions are in different statutes. But our *Justices Act* deals with appeals and the procedure therein, and with the control of the Supreme Court in regard to them, and provides that the Supreme Court may determine the case, any Act to the contrary notwithstanding. I think, therefore, that this argument is not correct.

It was then urged that as under Act No. 565 and previous

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statutes the power to state a case was permissive merely it might then well be that the decision of the sessions was not final if the court itself wished the matter to go further, but that when Act No. 953 made the statement of a case compulsory it was intended thereby to exclude rating appeals owing to the enactment as to their finality. This would, I think, be an extreme case of repeal by implication. The argument assumes that prior to the passing of Act No. 953 a case might be stated in rate appeals if the Court of General Sessions thought fit, but that when the Legislature provided that in all appeals a case must be stated if required, then by implication rate appeals are excluded. So that an alteration evidently intended to confer a right upon appellants has incidentally injured one large and important class. I do not agree with this contention.

The next view was that, whatever may have been the law prior to Act No. 1243, the right to have a case stated in rate appeals had been taken away by sec. 60 of that Act, which transfers the rate appeals to the County Court, and provides that the decision of such court shall be final and conclusive on all points. But I think that in passing secs. 60 and 61 of Act No. 1243 the Legislature had no thought of altering the law in this respect. The sole object sought to be attained was the substitution of the County Court for the Court of General Sessions. So I think that this view also fails. The only other contention that has to be dealt with is that the *Local Government Act* supplies a code of procedure of its own for rating appeals, and that, consequently, any other act is necessarily excluded. I agree that so far as the special Act does deal with the matter the general Act cannot apply. But in matters not so provided for the Act relating to general procedure would clearly be applicable.

During the argument many cases were cited, but I only propose to refer to *Russell v. Shire of Leigh (m)*. There the Court dealt with a case stated on rating matters, though it was objected that the determination of the sessions was final. The decision itself is in favour of the view that I have taken, but the reason

given has been quoted as opposed to it. The only answer given by the Court to the objection as to jurisdiction was that the fact of the question having been referred gave the Supreme Court power to hear the case. This could not mean that although the Court of General Sessions had no power to state a case yet where it had improperly done so jurisdiction would arise. Such an illegal reference would not give anybody jurisdiction over anything. The real meaning is that, as the law then stood, the Court of General Sessions could not have been compelled to state a case, but that having chosen to do so, the Supreme Court at once obtained jurisdiction. In this light this case is of authority in the present matter.

I conclude, therefore, that the County Court has jurisdiction to state a case in rating appeals, and this rule *nisi* will be absolute, with costs.

Solicitors for the appellants: *Malleson, England & Stewart.*

Solicitors for the respondents other than the Mayor, etc., of Fitzroy: *Herald & Roberts.*

Solicitors for the Mayor, etc., of Fitzroy: *Crisp, Lewis & Hedderwick.*

A. F. M.

NALLY v. WALSH.

Practice—Appeal from County Court—Taxation of costs—Security for costs—“ Trial ”—County Court Act 1890 (No. 1078), ss. 133, 147.

An order of a County Court Judge reviewing the Registrar's taxation of a bill of costs may be subject to an appeal to the Full Court.

Upon such an appeal it is not a necessary condition under sec. 133 of the *County Court Act* that the appellant pay into Court or give security for the amount of the bill of costs.

Costs relating to interrogatories and notices to produce and to admit, and costs relating to the preparation and engrossment of counsel's brief are costs in the action as distinguished from costs of the trial.

APPEAL from an order of a County Court Judge.

The plaintiff brought an action in the County Court to recover from the defendant damages in respect of injuries alleged to be caused by the defendant's negligence. Upon the hearing of the action the jury gave a verdict in favour of the defendant, and judgment was entered accordingly, with costs.

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On an application by the plaintiff to have the judgment and verdict set aside and for a new trial, the learned Judge of the County Court ordered a new trial to be had upon certain terms. Those terms were that the plaintiff should within ten days from the date of the Registrar's *allocatur* given in the taxation of the defendant's costs, pay into Court the defendant's taxed costs of the previous trial, and should pay to the defendant's solicitor the costs of the application. On the taxation of the defendant's bill of costs delivered in pursuance of that order the solicitor for the plaintiff objected to certain items on the ground that the bill included the whole of the costs of the action, whereas by the order the costs ordered to be paid into Court were the costs of the previous trial. The Registrar having overruled this objection, the plaintiff sought to review this taxation by having the items objected to struck out. The learned Judge of the County Court on review disallowed some of the items objected to, and ordered that the bill of costs should be reduced by the amount of them, but as to the other items objected to confirmed the taxation, and ordered the costs of the review to be paid by the defendant. From this order the plaintiff appealed.

Dr. M'Inerney appeared for the appellant.

F. G. Duffy appeared for the respondent—There are two preliminary objections :—(1.) The appellant has not, as required by sec. 133 of the *County Court Act* 1890, paid into Court or given security for the amount of the taxed costs. (2.) This Court will not entertain an appeal from the order of a County Court Judge upon a question of taxation. The right of appeal is given by sec. 147 of the *County Court Act*, and sec. 133 merely supplies the machinery by means of which the appeal is carried out. Sec. 147 does not give the right of appeal in the present case. This Court will not interfere with the practice of the County Court. The matter now appealed from is purely one of practice.

Counsel referred to *Argyle v. Whitton* (a); *Carr v. Stringer* (b); *Wrixon v. Deehan* (c); *Mays v. Watmough* (d).

(a) [1897] 21 V.L.R. 700.

(b) [1858] E.B. & E. 123.

(c) [1865] 2 W.W. & A'B. (L.) 16.

(d) [1880] 6 V.L.R. (L.) 169.

Dr. M'Inerney—Under the order now appealed from nothing is to be paid by the appellant to the respondent. Sec. 133 gives the right of appeal, and is general in its terms. Sec. 147 uses the word "final," because *certiorari* only applied to final orders: *Clifton v. Furley* (e); *Barnard v. Mann* (f).

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MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., and HOLROYD and HODGES, JJ.] This is an appeal from a decision of the learned Judge of the County Court, by which he determined that certain items of costs relating to an action in which he had previously made an order granting a new trial should be paid into Court. The order now appealed from is one in which the learned Judge affirmed the decision of a taxing officer as to certain items in the bill of costs, and disaffirmed it as to other items. Objection has been in this case taken, in the first instance that the appeal section, sec. 133 of the *County Court Act* 1890, has not been complied with, inasmuch as the amount assessed as the proper allowance of costs under the taxation against the appellant, and represented by these items, has not been paid into Court to abide the appeal as required, it is argued, under sec. 133, where money has been ordered to be paid. It is said that this is a condition precedent, non-compliance with which causes the appeal to fail. But we do not think this contention is correct. The order now appealed from is not an order requiring the payment of money, and therefore does not come within the provision of sec. 133. The previous order of the learned Judge below granting a new trial directed in the first instance that the plaintiff should pay into Court the amount of the defendant's taxed costs of the previous trial. But that order was the only order which could be enforced at all as effective. Under that order it was provided that the costs to be paid into Court should be the taxed costs, and it was directed that the payment of these costs should be a condition precedent to a new trial being granted to the plaintiff. Excepting under that order there was no direction to pay the costs under any circumstances. The subsequent order was merely an attempt by the plaintiff to obtain an abatement of the costs he had been ordered to pay

(e) [1862] 31 L.J. Ex. 170.

(f) [1876] 2 V.L.R. (L.) 140.

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into Court by the previous order by means of an application to review the allowance of certain items by the taxing officer. On that occasion the Judge merely decided as to the propriety or otherwise of the particular items of costs in the taxation. He did nothing more. He added nothing to the order for payment into Court. Therefore, it is clear that there was no money to be paid into Court to abide the event of the appeal, as is required by sec. 133.

A further objection was raised, viz., that an order by a Judge of the County Court upon a review of taxation is not the subject of an appeal to this Court. It is somewhat remarkable that such a matter as this should be without direct authority, the Act having been so long in operation. Before I refer to the sections which create the difficulty here, I think it would be well to point out that in the consolidation of the *County Court Act* certain words of sec. 120 of the Act of 1865 were entirely misread, and that the Act of 1890, as now expressed on its face, would have entirely altered the intention of the Legislature as originally expressed. In sec. 120 of the *County Court Statute* 1865, the words were:—"Any party to any action suit matter or proceeding in any County Court other than suits matters or proceedings under Part IV. of this Act for which an appeal is hereinbefore provided who shall be dissatisfied with any judgment decree or order of a Judge thereof not being an order of commitment made by such Court or Judge may appeal from the same to the Supreme Court," &c. That is to say, any party to any action, suit, matter, or proceeding under Part IV. of this Act at that time had an appeal from the County Court under the section. As to all other matters another form of appeal was provided. Those words "for which an appeal is hereinbefore provided" do not refer to the general operation of the Act. In the consolidation the words "other than suits matters or proceedings under Part IV. of this Act" are omitted, but the words "for which an appeal is hereinbefore provided" are left. The result was, firstly, to make the enactment unmeaning, because no appeal was *hereinbefore provided*, and also there was (as the matter was then left) no provision as to appeals on matters of general jurisdiction in the County Court. The Act No. 1348, however, has repealed

the words "for which an appeal is hereinbefore provided," which set the error right. It is not material to the questions to-day, but we merely notice the process of alteration in passing. The present difficulty arises in this way. The section if read properly runs thus :—"Any party to any action suit matter or proceeding in any County Court who, etc. . . . may appeal." The words are as general as possible and cover every kind of order made by the County Court or by a Judge thereof. Therefore these words give a right of appeal with the utmost generality. It is argued by Mr. Duffy that sec. 133 is really not the appeal section of the Act at all, but is merely a section which prescribes procedure in cases where appeals are allowed by the Act, and that sec. 147 is the appeal section. He contends that if this is so the present matter is not appealable, because it does not come within the language of sec. 147. The words of that section are :—"Every final decision by which the merits may be concluded," and at first sight this seems a very strong argument, but if we examine closely the sections together, the difficulty disappears, because sec. 133 is extremely wide and at the same time very specific as to what matters are appealable under it. Sec. 147 according to the subdivisional heading relates to *certiorari* and to that only. Therefore its first function is to do away with *certiorari*. Its next function is to give a substitute for *certiorari*, not an equivalent substitute, but, as contrasted with *certiorari* at common law, one much more limited. The section provides also that as to judgments, etc., in any action, *certiorari* is taken away, but an appeal is given. Then come some very important words which seem to denote accurately the intention of the Legislature. These words are :—"Every final decision by which the merits of the case may be concluded of a Judge of a County Court given or made in any such action cause suit matter or thing before any such Court or Judge shall be subject to review by way of appeal as *hereinbefore* provided." The words "appeal as hereinbefore provided" clearly show that the appeal is not an appeal given by sec. 147, but one given by sec. 133. This section itself gives no appeal independently, but "an appeal as hereinbefore provided," and makes us therefore turn back to sec. 133. The subdivisional heading of the latter

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section is "Appeals." It may be looked at, as the language of the section is doubtful. It seems, therefore, that one section relates to appeal, the other to *certiorari*.

We therefore think this is an order of a Judge of the County Court within sec. 133, and it is a matter in respect of which an appeal lies. We will hear the appeal.

Dr. McInerney for the appellant.

F. G. Duffy for the respondent.

MADDEN, C.J., delivered the judgment of the Court. We think this appeal should be allowed. All the items in the bill of costs challenged by the plaintiff appear when examined to be properly challenged. The order of the Judge below upon the new trial motion was that the defendant's costs of the trial should, when taxed, be paid into Court. There appears in the bill of costs a series of items relating, many of them, to interrogatories administered by both the plaintiff and the defendant in the action. These items will stand to the end of the action. It is suggested that other interrogatories might be permitted, but that is doubtful. But even if it was so these will stand to the end of the case. And it may be that, in so far as they were not used in the former trial, the new trial may be presented in such a manner as to make them valuable and admissible evidence. The costs of exhibiting such interrogatories seem to us clearly to be costs in the action as distinguished from costs of the trial. Then, again, there are in the bill of costs certain items relating to notices to produce and to admit. It has not been seriously contended by the defendant that the costs of these notices to admit are not costs in the action. They refer to all intents and purposes to admissions required in the litigation, and do not relate to any particular trial. The question is not so clear, however, with regard to the costs of notices to produce. Notices to produce do not stand exactly upon the same footing as notices to admit; but the case of *Lord v. Wardle (g)*, relied upon by Dr. McInerney, appears to settle the point by deciding

(g) [1837] 6 Dowl. P.C. 174.

that the costs of such notices are costs in the action. The costs of both classes of notices are in *pari materia*. In the case referred to Tindal, C.J., in delivering judgment said:—"The costs of notices which were given in the cause, of attending judges, and making admissions, are the same on the second trial as on the first." The words used are general, and would appear to indicate all notices, and no separate order was made with regard to notices to produce, thereby indicating that both the kinds of notice now in question were referred to. So that according to that decision the costs of notices to produce are costs in the action and not costs of the trial. It has been argued that there were two trials, not *the* trial; but in *Lord v. Wardle* the argument throughout was that there was one trial practically, though there was a subsequent retrial. It is *the* trial. And if one remembers this principle also, that would appear to be right, because where there has been a mistrial by reason of some miscarriage—*e.g.*, in swearing in the jury—that is always spoken of, not as a trial, but as an abortive trial, and the new trial is called *the* trial. There appears to be no reason why, in a case where there is a new trial, because the verdict in the first was against the weight of evidence, there should be any distinction. Therefore, no matter how many trials are had, in fact, in order to get at the lawful determination of the action—the whole is in fact one trial. Whatever, therefore, is required to be done for the trial will stand to the end. There is also another item in the bill of costs—namely, 5*l.* for drawing and engrossing brief to counsel. At first I thought that this clause was one upon which the Registrar of the Court below had a right to exercise his discretion because obviously the brief upon the new trial might differ widely from that used upon the first trial; but the case above referred to, of *Lord v. Wardle*, is an authority that the rule is otherwise. In the judgment it is said that—"One question is as to the allowance of costs for preparing the briefs. There may be cases in which some alteration is necessary in briefs, but these should form exceptions to the general rule, by its being made out to the satisfaction of the Prothonotary that the amendments are necessary." Upon this authority, therefore, it is clear that the rule is that the costs of drawing a brief for counsel

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shall be costs in the action, although in special cases where special evidence is presented to the taxing officer they may be shown to be otherwise. In the latter case they may be treated as costs of the trial. Therefore if the special proof required be not given the cost of preparing counsel's brief is to be treated as costs in the action. Therefore in our opinion all the items challenged are rightly challenged. Consequently we think this appeal should be allowed with costs. There is no necessity for sending the matter in dispute down again. We have before us the materials necessary for deciding it. The amount which should be struck off from the bill of costs by reason of the appeal having been allowed is 18*l.* 8*s.* 6*d.* That amount will be taken off.

Appeal allowed.

Solicitors for the plaintiff: *McInerney & McInerney.*

Solicitors for the defendant: *Gaunson & Cumbræ-Stewart.*

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 May 18.

IN THE MATTER OF LEONARD ARTHUR HORSFALL (STUDENT AT LAW).

Practice—Supreme Court—Admission of barrister and solicitor—Student at law—
“ Rules of Supreme Court 15th October 1887,” rr. 7, 8 ; 1892, r. 22.

A student at law without permission of the Board of Examiners previously obtained left Victoria. On an application by the student for leave to apply for such permission :

Held, that rule 22 of the Rules of 1892 did not apply, and that therefore the application could not be entertained.

MOTION.

On 30th November 1891 Leonard Arthur Horsfall was admitted as a student at law by the Board of Examiners. In March 1895 he completed his course for and was admitted to the degree of Bachelor of Laws. In February 1896 he left Victoria for Perth, Western Australia, where he has since been residing. Since his arrival he had been employed in the Lands Titles Office of Western Australia and in other law offices in Perth and Coolgardie, and has not been engaged in any other occupation. In June 1897 he was informed by a fellow student that it was

necessary under the rules to obtain special leave before ceasing to reside in Victoria, whereupon he applied immediately to the Board of Examiners for leave. The Board intimated that it had no power to grant the desired leave until the time for making the application had been extended by the Court. Application was now made by Horsfall upon motion for permission to apply to the Board for leave. It was stated by the applicant that he had no intention of infringing the rule, and that until informed that leave was necessary he was unaware of the rule. He further stated that he was under the impression when he left Victoria that he had by serving as a student at law for more than one year sufficiently complied with the rule, and that in the course of a year he intended to return to Victoria for the purpose of applying for admission as a barrister and solicitor.

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Wasley to move—The order sought is similar to that granted in the case of *In re J. M. Smith (a)*. The applicant merely wishes the leave of the Board to reside in Western Australia, and asks now that the time for making the application for leave be extended.

[HOLROYD, J. He should have applied before he left. If the Board gives him the leave should we say that the leave is to be antedated ?

MADDEN, C.J. Why is it necessary for us to give leave to apply to the Board ?]

The leave to be granted by the Board must be obtained before the applicant leaves Victoria: Rules 15th October 1887, r. 7 (b). R. 22 of the Rules of 1892 says "another time may be substituted."

[HOLROYD, J. You wish the Court to say instead of the application being made before the applicant leaves that the time for making it should be such and such a time after he has left Victoria. That is to say, we are asked to strike out the words "leave first obtained." You wish us to make an order in spite of the rule.]

(a) 21st February 1896 (unreported). shall (2) Or cease during any part of his studentship to reside in

(b) 1887: "R. 7. *Studentship*.— Victoria without special leave first No person admitted as a student at law obtained from the Board"

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R. 22 (c) was intended to apply to cases of this sort.

[MADDEN, C.J. This rule has been heretofore directed to cases in which the Court has had jurisdiction. Under r. 7 you are too late, and we should have to set aside that rule.]

HODGES, J. Leave to make an application to the Board is not required from the Court. Even if the Court granted leave it would not help the applicant.]

In re Smith was on exactly similar facts.

[MADDEN, C.J. Leave to apply to the Board would be useless unless it carried with it an injunction enabling the Board to grant the application to it *nunc pro tunc*. In granting leave to apply, the Court would be creating a false position for the Board and for themselves. We have no power to order the rule to be waived.]

HOLROYD, J. If I was a member of the Court when *In re Smith* was decided, I was most certainly wrong. I do not think r. 22 covers this case.]

If leave to apply is granted by the Court the Board will consider the application.

[HODGES, J. Your application is to condone and to extend a continuation of the offence of absence from Victoria.]

HOLROYD, J. To grant it would be equivalent to saying that the proper time for making an application for leave to leave Victoria should be three months after the applicant has left.]

I ask now for a form of order giving leave to apply to the Board for leave.

[HOLROYD, J. Suppose the Court substitutes three months. Now you are making your application, the leave given could not relate back. We do not repeal the rule, and we do not say it is not to be regarded. We cannot do so.]

(c) 1892: "R. 22. In case of non-compliance within the specified time with any rule now or hereafter to be in force for the admission of barristers and solicitors the Court shall have power upon application made to it for that purpose to enlarge or abridge the time appointed by any rule for doing any act or taking any proceeding and may substitute for any time appointed for doing any act or taking any proceeding any other time upon such terms as the Court may think fit and any such enlargement abridgement or substitution may be ordered although the application for the same is not made until after the expiration of the time appointed."

I ask leave to withdraw the application.

MADDEN, C.J. We think, as at present advised, we can do nothing for you. You are at liberty to withdraw the motion and to renew it on another day of term.

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On a subsequent day the application was renewed.

Cussen and *Wasley* to move—The applicant had been a student at law for more than a year before he left Victoria, and was of opinion, though erroneously, that one year was enough. R. 15 of October 1887 is drawn in very general fashion in order to get over the very serious results of such a case as this. R. 22 of the Rules 26th November 1892 is a copy of a rule passed on 14th December 1892, which substitutes the word “solicitors” for “attorneys.” Except for that alteration it is practically the same rule.

[HODGES, J. That rule involves the idea that a certain time is prescribed for the doing of a certain act. No time is substituted here.]

The rule could be construed more generally than that.

[MADDEN, C.J. He should have had permission. He “ceased to reside” without permission. What is now asked for is leave to make an application which could be made just as well without the leave of the Court.]

This course was followed in the case of *In re J. M. Smith* (d). The Board of Examiners has always treated the granting of leave by the Court as making a hearing of the application obligatory. At present it declines to hear it.

[HODGES, J. You desire a mandatory order that leave should be granted to the applicant.]

Counsel referred to *In re Edward John Syder*, 13th February 1891 (d), and *In re James Kotupna Murphy*, 8th November 1895 (d).

MADDEN, C.J. Perhaps the best method of dealing with this application will be to confer with the other members of the Court upon it.

Cur. adv. vult.

(d) Unreported.

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MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HOLROYD and A'BECKETT, JJ.] In this case an application was made to us that a special order should be made granting the leave of the Court to the applicant to apply to the Board of Examiners for leave to reside out of the Colony. The applicant relied upon r. 22 of the "Rules of the Supreme Court 1892." We are of opinion that the rule does not apply here, and that the application if made to the Board could not have any effect.

Upon this matter time has been taken for consultation with other Judges as to what had been done in the previous case which has been cited before, and as to what might be thought regarding the rule. All the Judges are of opinion that the rule does not apply to cases such as that of the present applicant, and that it would not be a proper thing to make the order asked for. They are, however, pressed with the fact that although the applicant appears to have recklessly left this colony without considering for a moment the effect his going away would have upon his future career, the result being that he now stands disentitled to any benefit from his previous study and examinations, of his own motion he chose to disregard the rule which requires him to obtain the leave of the Board before going away. The Court feels that there is no power to break through the rule. Still the Court feels also pressed with the responsibility of depriving a man who has done all the substantial work required, of the result of that work, and with the fact that his absence from Victoria could not have interfered with his studies at the stage at which he left the colony. He has, however, broken the rule.

It is proposed that another rule be passed within whose operation the present applicant may come. Of the two evils this appears to us to be the lesser. Our judgment, which might otherwise result in disaster to the present applicant, will thus do him no injury.

Motion refused.

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SPENSLEY AND OTHERS v. THE COLLECTOR OF IMPOSTS.

F.C.

*Stamps—Stamp duty—Settlement, deed of—Indenture or disentailing assurance—
Stamps Acts 1890 (No. 1140), sec. 71 ; 1892 (No. 1274), ss. 24, 25, 28, Schedule
Division VIII.*

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March 25, 28.

In determining whether an instrument is taxable as a settlement under Act No. 1274, Schedule Division VIII., the subject matter of the instrument will not be considered, but only the instrument itself. The value of the property settled is merely looked at in order to fix the amount payable in respect of the tax.

By a deed of settlement certain properties, the subject of a prior deed of settlement, were disentailed, and new interests created in lieu of the entail and as consideration therefor, but as to the bulk of the property the earlier settlement prevailed.

Held, that as the intention of the Legislature was to impose a tax upon such instrument, the tax was payable upon the whole subject matter of the instrument, without regard to the property unaffected thereby.

SPECIAL CASE stated by the Collector of Imposts under sec. 71 of the *Stamps Act* 1890.

The case was as follows :—

"1. On 28th May 1897 Messrs. Blake and Riggall, as solicitors for all parties to an indenture of resettlement and confirmation, dated 11th November 1896, made between Howard Spensley of the first part, Martha Tasmania Spensley of the second part, Howard Spensley of the third part, Samuel Thomas Staughton of the fourth part, and Samuel Thomas Staughton and Frederick William Armytage of the fifth part, produced the said indenture, a copy of which forms part of this case and is marked "A," to the Collector of Imposts, and required his opinion—

(a) Whether it was chargeable with any duty.

(b) With what amount of duty it was chargeable.

"2. On 31st May 1897 the Collector, being of opinion that the instrument was a settlement, wrote to Messrs. Blake and Riggall requiring a statement of the property comprised in the indenture, and of its value, verified by statutory declaration of the trustees, or of one of them, in terms of sec. 30 of Act 1274.

"3. In compliance with the requisition in paragraph 2, Messrs. Blake and Riggall produced to the Collector a statutory declaration made on 13th July 1897 by John Vernon Taylor, declaring that he was the duly authorized agent for and on behalf of the trustees named in the said indenture, wherein was contained a statement of the property and of its value.

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"4. The Collector, not being satisfied with the estimated value of the property as declared by the said John Vernon Taylor, nominated Alexander M'Calla to make a valuation of the same, and on 8th October 1897 his valuation, showing it to be worth £63,000, was produced to and accepted as the value for duty by the Collector.

"5. On 8th October 1897 the collector assessed the duty payable at 1,272*l.*, and on the 9th October 1897 notified Messrs. Blake and Riggall that the duty payable on the said indenture amounted to 1,272*l.*

"6. On 20th October 1897 Messrs. Blake and Riggall paid to the Collector the duty, 1,272*l.*, as assessed, and on the 22nd October in writing requested him to state and sign a case setting forth the question upon which his opinion was required and the assessment made by him.

"7. In compliance with the requisition in this behalf, and pursuant to sec. 71 of the *Stamps Act* 1890, I, James Davidson, Collector of Imposts under the *Stamps Act*, do hereby state and sign this case setting forth the question upon which the opinion of the Collector of Imposts was required and the assessment made by him as follows :—

"1. The questions required to be answered by me were—
(a) Whether the instrument was chargeable with any duty.
(b) With what amount of duty it was chargeable.

"2. My assessment was that the instrument is a deed of settlement or gift within the meaning of the Schedule Division VIII. to the *Stamps Act* 1892 (No. 1274) of the property mentioned therein and that the instrument was accordingly liable to the duty as assessed—viz., 1,272*l.*"

The indenture referred to (so far as is material to this report) after setting forth the parties thereto ran thus :—

Whereas Simon Staughton duly executed his last will, dated the first day of April one thousand eight hundred and sixty-three, and thereby devised to the said Samuel Thomas Staughton Frederick William Armytage and George Christian Darbyshire (hereinafter referred to as "his said trustees") their executors and administrators all his residuary real estate (which comprised the hereditaments specified in the schedule hereto) for the term of five hundred years upon certain trusts which have come to an end with a proviso for cesser of the said term under which the said term has determined and subject thereto the said testator devised the said hereditaments specified in the said

schedule hereto unto his said trustees their executors administrators and assigns during the life of his (the testator's) daughter Martha Tasmania Spensley (then Martha Tasmania Staughton spinster) upon trust after any and every marriage which his said daughter should contract after his decease to create and declare by some instrument in writing under the hands of his said trustees a trust of the rents and profits of the said hereditaments in her favour during her then coverture for her separate and inalienable use and the said testator thereby empowered his said daughter whether sole or covert by any deed or deeds with or without power of revocation and new appointment or by her last will to limit the said hereditaments or any part thereof to any husband for his life in remainder expectant upon the decease of the said Martha Tasmania Spensley and subject to the trusts hereinbefore recited the said testator devised the same hereditaments to every son of the said Martha Tasmania Spensley and his issue male in succession so that every elder son and his issue male might be preferred to every younger son and his issue male and so that every such son might take an estate for life with remainder to his first and every subsequent son successively according to seniority in tail male with divers remainders over and the testator devised and bequeathed the residue of his real and personal estate to his son the said Samuel Thomas Staughton for his absolute benefit and the said testator appointed the said Samuel Thomas Staughton Frederick William Armytage and George Christian Darbyshire trustees and executors of his said will and whereas the said testator died on the eighteenth day of May one thousand eight hundred and sixty-three without having altered or revoked his said will and the same will (was) duly proved in the Supreme Court of the colony of Victoria by the said Samuel Thomas Staughton Frederick William Armytage and George Christian Darbyshire. And whereas the said Martha Tasmania Staughton spinster intermarried with the said Howard Spensley the elder and there have been issue of the said marriage the said Howard Spensley the younger and whereas under the said trusts contained in the said will two deeds poll were executed immediately before the solemnization of the marriage by one of which the trustees declared that from and immediately after the solemnization of the said marriage they would hold the rents and profits of the said hereditaments in favour of the said Martha Tasmania Spensley during her coverture for her separate and inalienable use and by the second of which said deeds poll the said Martha Tasmania Spensley limited and appointed the said hereditaments to the said Howard Spensley the elder for his life in remainder expectant upon her decease. And whereas the said Martha Tasmania Spensley is now tenant for life and subject to the life estate of the said Howard Spensley the elder the said Howard Spensley the younger as the eldest son is the tenant for life thereof in remainder. And whereas by the 109th section of the *Victorian Real Property Act* of 1890 it is provided that where under any will executed before the passing of the Act numbered 872 (1885) an estate for life in any land is given to any person followed by an estate for life in remainder to any child of such person and ultimately or immediately by an estate tail in remainder to any grandchild of such person such person and the child of such person may together bar the entail and dispose of the estate as fully and effectually as if the estate given to the child had been for an estate tail. And whereas by an indenture dated the tenth day of November one thousand eight hundred and ninety-six the entail of the said hereditaments (was) absolutely

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barred and extinguished to such uses nevertheless as the said Martha Tasmania Spensley Howard Spensley the elder and Howard Spensley the younger or the said Howard Spensley the younger and the survivor of them the said Martha Tasmania Spensley and Howard Spensley the elder might by deed jointly appoint. Such appointment nevertheless to be so framed as not to disturb the life estate of the said Martha Tasmania Spensley thereafter limited and in default of and until such appointment and so far as any such should not extend to the use that the said Martha Tasmania Spensley might take the rents and profits of the said hereditaments during her life for her separate and inalienable use with divers remainders over. And whereas the said Martha Tasmania Spensley Howard Spensley the elder and Howard Spensley the younger are desirous of exercising the joint power of appointment vested in them by the last indenture in manner hereinafter appearing. And whereas doubts have arisen as to the validity of certain limitations of the said will in relation to the said estate in tail male and whether the (parties) could effectually bar the estate of the residuary devisee under the said will. And whereas in order to set all such doubts at rest the said Samuel Thomas Staughton as residuary devisee has agreed to join in these presents in manner hereinafter appearing. Now this indenture witnesseth as follows :—

1. In exercise of the power in this behalf conferred on them by the indenture or disentailing assurance of the tenth day of November one thousand eight hundred and ninety-six the said (parties) do hereby jointly appoint that from and immediately after the determination of the aforesaid life estate of the said Martha Tasmania Spensley therein all the hereditaments shall go and by way of further assurance and for the purpose of setting at rest all doubts and for the purpose of conveying or releasing any reversionary or other estate (if any) vested in him or which might devolve on him as residuary devisee the said Samuel Thomas Staughton doth hereby grant the same hereditaments unto and to the use of the trustees upon the trusts hereinafter declared concerning the same, &c.

Weigall for the Collector of Imposts—The indenture is clearly a deed of settlement within the meaning of the Schedule Division VIII. The sub-headings of the division merely indicate what are deeds of settlement or of gift, and do not exclude these documents. The document itself must be looked at. The fact that a previous settlement of the bulk of the property is practically unaffected is not material.

[HOLROYD, J. Is the exercise of a power of appointment a settlement?]

An exercise of a general power of appointment is a settlement under sec. 28 of the *Stamps Act* 1892, but an exercise of a special power is not. Here there is no exercise of a power of appointment.

(Counsel was stopped.)

Johnston for the parties to the indenture—The main question is whether the Legislature intended to tax a deed of resettlement on the basis of the total value of the property comprised in the settlement. The true intention is to tax the beneficial interest newly created by the deed, and it is the duty of the officer to find out the value of that beneficial interest. By evidence he could arrive at the present value of Mrs. Spensley's life interest, and of Howard Spensley the younger's life interest, subject to the encumbrances, and having arrived at that value, that is the basis of taxation. It is not contended that the indenture is not a settlement, but that the tax has been calculated on a wrong basis. Where an instrument is the mere device of a conveyancer, the Court should look at that fact: *Wiseman v. Collector of Imposts* (a).

[HOLROYD, J. Suppose the interest of one of the old beneficiaries is by the new settlement taken away, do you contend that that *quid pro quo* would not be taxable?]

I would go so far. The tax being intended to be imposed upon newly created interests, a distinction must be drawn between the present and future value of the interests. Suppose property were settled for 99 years with a reversion afterwards to A and his heirs, then according to the argument for the Collector a deed resettling the property so as to give the reversion to B and his heirs would be taxable on the basis of the whole value of the property. Unless the Court feels driven to do so, it should not give such an interpretation to the schedule.

[MADDEN, C.J. The difficulty is that it is the instrument that is to be taxed, and it being established that the instrument is a settlement, it is, according to the schedule, taxable upon the basis of the value of the property comprised in it.]

Counsel referred also to *Davies v. Danby* (b); *Castlemaine Brewery Company v. Collector of Imposts* (c); *Brett v. Collector of Imposts* (d); *Moffat v. Collector of Imposts* (e).

Weigall in reply—Reference to sec. 29 of the *Stamps Act* 1892 shows that it is actual physical property that is to be

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(a) [1896] 21 V.L.R. 743.

(d) [1896] 22 V.L.R. 589.

(b) [1887] 13 V.L.R. 957.

(e) [1896] 22 V.L.R. 164.

(c) [1896] 22 V.L.R. 4.

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valued, and not the interest created by the deed in that property.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., and WILLIAMS and HOLROYD, JJ.] The intention of the Legislature was apparently this:—In the first instance, at the time the *Stamps Act* 1892 was passed, a tax already attached to the conveyance or transfer on sale of any real property based upon the consideration for such sale. That consideration, of course, appeared in the conveyance or transfer which represented the sale. We may assume that sales were not always made for full value or for an adequate consideration, and that the consideration set out in the conveyance or transfer was sometimes fictitious. The Legislature found that in this way the payment of the tax was avoided or evaded. Then the provision was made in Division VIII. of the Schedule to the Act of 1892 for deeds of settlement or gift. That provides that “any instrument whether voluntary or upon any good or valuable consideration other than a *bond-fide* adequate pecuniary consideration whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be given in any manner whatsoever such instrument not being made before and in consideration of marriage” shall be taxable. It does not matter what consideration is given provided it is not a *bond-fide* adequate pecuniary consideration, for if there were such a consideration there would be a sale, and the tax imposed by the Act of 1890 would catch it. But where there is no consideration for the instrument, or where the instrument is merely voluntary or sets out a good or valuable consideration short of an adequate pecuniary consideration, such an instrument is a settlement within the meaning of the schedule, and is taxable on the basis of the value of the property the subject matter of the instrument. An examination of the sections of the Acts and of Division VIII. seems to show that to be the intention of the Legislature. Looking at sec. 25 of the Act of 1892, the provision there seems to bear out this view. That section provides that “where any money which may become due or payable upon any security (not being a marketable security)

is settled or given or agreed to be settled or given the instrument whereby such settlement or gift is made or agreed to be made is to be charged with *ad valorem* duty in respect of such money and in the case of a marketable security is to be charged with the *ad valorem* duty on the value of such security." Therefore, in the case of money settled, it is quite plain that the instrument itself is the thing taxed, and that the money settled is the basis upon which is to be calculated the amount of the tax. That being so, there seems to be no reason why the Legislature should have intended to make any difference between money and other things. We think the history of the Acts, their language, the analogy of sec. 25, and the whole of the authorities on the matter support this view. The case of *Wiseman v. Collector of Imposts* may be set aside, because it relates to a thing which could not be a settlement in any view. In the case of *Moffat v. Collector of Imposts* the Court, as soon as it became aware that the balance of the money was the subject of the settlement, held that the whole thing was liable to taxation. Although this view works hardship in this case, the language of the Act is so plain and distinct that the Court ought to give effect to it. The parties having entered into a settlement amongst themselves, the tax attaches. The moral appears to be—beware of settlements. The answer we make to the questions is that the instrument is a deed of settlement within the meaning of the Schedule Division VIII. of the property mentioned therein, and is chargeable with the amount of duty assessed by the Collector. The assessment will be confirmed, with costs against the appellant.

Assessment confirmed.

Solicitors for the appellants: *Blake & Riggall.*

Solicitor for the Collector of Imposts: *Guinness*, Crown Solicitor.

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[PRACTICE COURT.]

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THE QUEEN (EX RELATIONE DAVID BURKE) v. PATRICK O'DAY.

Local Government Acts 1890 (No. 1112), ss. 49, 257; 1891 (No. 1243), s. 15—

Municipal councillor—Qualification—" Liable to be rated."

An owner of rateable property which is in the occupation of a tenant is not a person *liable to be rated* in respect of the property within the meaning of sec. 15 of the *Local Government Act 1891*.

Re Joseph Pethybridge (A.R. 5th April 1869) followed.

ORDER *nisi* under sec. 166 of the *Local Government Act 1890*, calling upon Patrick O'Day, a councillor of the shire of Bungaree, to show cause why an order should not be made ousting him from the office of councillor, upon the ground that at the dates of his nomination and election he was not and has not since been possessed of the requisite qualification entitling him to be nominated for or of being elected as a councillor of the shire, or of holding the office of councillor, inasmuch as he was not and is not a person liable to be rated in respect of property within the shire of Bungaree of the rateable value of 20*l.* at the least.

O'Day was the owner in fee simple of land within the shire of Bungaree, on which was erected a hotel. The hotel and land were leased to a tenant at a weekly rent of 2*l.* 10*s.*, and were assessed in the books of the shire at the annual value of 48*l.*, upon which sum the tenant was rated and paid the rates. O'Day did not occupy any land within the shire.

Wasley to move the order absolute.

Topp to show cause—Sec. 15 of Act No. 1243 should be interpreted liberally. Both the owner and the occupier of rateable property are persons liable to be rated. The rates are a charge on the land. The Act does not say a person rated, but a person *liable to be rated*. Although the occupier is the person liable primarily, the ownership of the property is to be considered as an element of liability, because the section uses the words "no person shall cease to be qualified by reason of ceasing to hold the particular property." The owner of property has to pay the rates if the occupier make default.

[MADDEN, C.J., referred to *Reg. v. Scarlett, ex parte Lunny (a).*]

The occupier is not *liable to be* but *is* rated.

[MADDEN, C.J. Under sec. 246 of the *Principal Act* all land is to be rated. The rate is to be established in respect of the land, and is payable in the first place by the occupier, and if there be no occupier by the owner.]

There may be two or more persons liable to be rated at the same time in respect of the same property. The latter part of sec. 15 of Act 1243 cannot refer to the occupier at all. The holding of property must certainly point to the owner. "Hold" is equivalent to "own." The words are general.

Counsel referred to sec. 257 of the *Local Government Act* 1890.

Wasley in reply—When there is a tenant in occupation of property the owner is not liable to be rated. The question whether a person is liable to be rated depends upon the facts of the particular case. If there is no tenant in occupation the owner is the person liable to be rated and qualified to hold office as councillor. If both owner and occupier were liable to be rated, both would have to pay the rates. At none of the times material to this case was O'Day liable to be rated: *Re Joseph Pethybridge (b).*

MADDEN, C.J. I think this order must be made absolute. O'Day, it is true, is the owner of property within the shire of Bungaree sufficient to qualify him, but this property is in the occupation of a tenant. The Act intends that there shall be only one person at a time liable to be rated in respect of any one property, and this is so not only for the purpose of recovering the rate but also for the purpose of determining what persons shall take part in the government of the municipality. Where there is an occupier he is the person liable to be rated. He is the person primarily liable to be called upon to pay the rates. If Mr. Topp's contention be correct, both owner and occupier would be liable to pay the rates. I think it is quite clear that the

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(a) [1885] 11 V.L.R. (L.) 299.

(b) A.R. 5th April 1869.

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occupier, if there is one, is the person liable to be rated, and so long as he is in occupation the owner is not liable to be rated, although, should the occupier quit the premises without paying the rates, the owner would become liable for them. The case of *Re Joseph Pethybridge (c)* is a distinct authority for the proposition that when there is an occupier of premises the owner is not liable to be rated in respect of them. The order will be absolute, with costs.

Order absolute.

Solicitors for the relator: *Ford & Aspinwall* (for *Cuthbert, Morrow & Must*, Ballarat).

Solicitors for the defendant: *Dugdale & Creber* (for *Tuthill*, Ballarat).

R. H. C.

[IN CHAMBERS.]

FOLLETTI v. FOLLETTI AND ANOTHER.

Practice—Order in Chambers—Originating summons—Loss of order.

Where the order of a Judge at Chambers has been lost, the same Judge may, upon proof of the loss and of the terms of the original order, allow an order to be drawn up identical in terms with the lost order, but may also at the same time require an order to be drawn up reciting the loss of the original order, that the loss and the terms of the order have been satisfactorily proved, and that a similar order has been allowed.

APPLICATION *ex parte* that the signature of the Judge should be appended to an order in the place of one which had been lost.

The proceedings had been commenced by originating summons asking for the removal of the trustee in the estate of one Pietro Folletti deceased, and for the appointment of a new trustee in his place.

By consent an order was made by Madden, C.J., in 1896, upon this summons, removing the trustee and directing the usual inquiries as to new trustees. After it had been signed it was discovered that its form was wrong, inasmuch as by it the Chief Clerk was directed "to appoint" new trustees.

In July 1897 the same Judge, by consent of parties, made a supplemental order appointing two new trustees, and vesting the trust estate in them. This order was lost. Application was now made *ex parte* to Madden, C.J., by the plaintiff, that a new

(c) A.R. 5th April 1869.

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order in similar terms should be signed. Evidence as to the terms of the order and its loss was given.

Meagher for the applicant—From the affidavits the contents of the original order may be sufficiently gathered. Its loss also is clearly shown. A similar order to the one now asked for was made in *Douglas v. Yallop* (a); *Evans v. Thomas* (b); *Dayrell v. Bridge* (c).

MADDEN, C.J. You may take out another order. The authorities referred to relate to documents of greater importance than the one the subject of this application, and show that the order asked may be granted. The proper course will be for two orders to be drawn up. One order will be dated as of to-day, and will recite the loss of the order, that the loss and the terms of the order have been proved to my satisfaction, and that I have allowed a similar order to be drawn up. The other order will be identical in its terms with the lost order. The two orders, when read together, will show exactly what has happened.

Solicitors for the plaintiff: *Lyons & Turner* (for *Grenfell, Daylesford*).

R. H. C.

[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

[IN CHAMBERS.]

KEANE v. KEANE.

Practice—Divorce—Service of citation—Mode of proof—Jurisdiction—Marriage Act 1890 (No. 1166), sec. 113.

There is no jurisdiction in Chambers to make an order that the petitioner in a divorce suit be at liberty at the hearing to prove service of the petition and citation by affidavit.

APPLICATION by the petitioner in a divorce suit for an order that he be allowed at the hearing to prove by affidavit service of the petition and citation upon the respondent.

Bryant for the applicant—I can find no rule and no section of the *Marriage Act* 1890 dealing with this matter, but the

(a) [1759] 2 Burr. 722.

(b) [1729] 2 Str. 833.

(c) [1747] 2 Str. 1263.

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application is made under the practice: *Constable v. Constable* (a).

[HOOD, J. I do not see how I can interfere with the Judge at the trial.]

It is done where an order is made for substituted service.

[HOOD, J. In that case a power is given by the *Marriage Act*.]

In *Ellam v. Ellam* (b) the Court allowed proof of adultery to be given by affidavit, and in *Exparte Hobson* (c) the Court allowed proof of marriage and of cohabitation to be given by affidavit of the petitioner's solicitor. Sec. 113 of the *Marriage Act* allows a party to verify his case in whole or in part by his affidavit. If the Judge at the trial has power there can be no objection in principle to the making of the order now.

Cur. adv. vult.

HOOD, J. An application has been made for an order that the petitioner in a divorce suit be allowed to prove service of the petition and citation at the hearing by affidavit. In my opinion there is no jurisdiction to make such an order in Chambers. In support of the application several cases have been cited, but none of them really touch the matter. They all were cases in which the Court which heard the suit granted or refused the application, or they were cases in which orders were made under what is virtually sec. 113 of our *Marriage Act*. This section, however, does not apply to this case, because, in the first place, it applies only to the proceedings before the Court at the hearing; secondly, it relates to the proof of their respective cases by the parties, and I doubt very much whether under the Act proof of service is part of the case; and, thirdly, that section requires the deponent who makes an affidavit to be present in Court for cross-examination. Any one of these reasons would be fatal to this application. I was informed that orders such as that now sought have previously been made by other Judges, but I have not been able to find any of them.

Application refused.

Solicitor for petitioner : *Henry Westley*.

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(a) [1884] 1 W.W. & A'B. (J. E. & M.) (b) [1889] 61 L.T. 338.

88.

(c) [1894] 70 L.T. 816.

[IN CHAMBERS.]

WILKINSON v. CURRIE.

1898
June 14.Hood, J.

Practice—Supreme Court—Foreign procedure—Liquidated demand—Service in Western Australia—Costs—“Rules of Supreme Court 1884”—Order LXV., r. 12—County Court Act 1890 (No. 1078), s. 64, Part V.

Where in an action for a liquidated demand claiming an amount under 50*l.* the writ is served in Western Australia, and on the defendant's neglect to appear leave to proceed is granted and judgment is entered for the amount claimed, costs upon the *Supreme Court* scale will not be allowed.

APPLICATION under Order LXV., r. 12 of the “Rules of the Supreme Court” for an order that the plaintiff's costs be taxed upon the Supreme Court scale.

The action was for 37*l.* principal moneys and interest due under a contract. The writ was served in Western Australia. No appearance to the writ was entered by the defendant. The plaintiff obtained an order for leave to proceed in the action and that the Prothonotary should ascertain the amount for which judgment was to be entered therein. He also obtained an order for taxation of his costs. The Prothonotary refused to tax the costs on the Supreme Court scale.

The managing clerk of the plaintiff's solicitors—In *Harris v. Thomson* (a) Judge Hamilton refused to have a plaint summons issued under sec. 64 of the *County Court Act 1890* sealed for service out of the jurisdiction, in Western Australia, on the grounds—(1.) That an Order in Council had been made under sec. 138 of the *County Court Act*, directing that the provisions of Part V. of the Act should apply to Western Australia or that the certificates of judgments of County Courts in Victoria may be forwarded to Western Australia at the request of the judgment creditors. (2.) That the procedure prescribed by sec. 141 is inconsistent with sec. 64, which enacts that unless defendant within ten clear days after service give a written notice to the Registrar of his intention to defend, the plaintiff may enter final judgment without further proof of his claim. The County Court Judges refuse to act under sec. 141, because they hold that it conflicts with sec. 64.

(a) [1897] 3 *Argus* L.R. (C.N.) 41.

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[HOOD, J. I am inclined to agree with the view that sec. 64 does not apply.]

There is no method for recovering our judgment under Part V. of the *County Court Act*.

[HOOD, J. You can get judgment in the ordinary way.]

The judges in the County Court have to fix the time within which appearance is to be entered, but they decline to do so.

HOOD, J. In this case a writ has been issued in the Supreme Court for the recovery of 37*l.* alleged to be due to the plaintiff under a contract. The writ was served out of the jurisdiction, in Western Australia. The defendant has not entered an appearance and judgment with costs has been signed by the plaintiff. Upon application being made by the plaintiff to the Prothonotary to tax the costs, the latter declined to tax them on the Supreme Court Scale, on the ground that the judgment recovered did not amount to 50*l.*

Application is now made to me under Order LXV., r. 12, for an order that the plaintiff be allowed his costs on the Supreme Court scale. I would be glad to accede to the application, because I think it is a *bond fide* one, but I am unable to do so without laying down a general principle applicable to other cases of a similar character. I cannot certify that the action is one properly brought in the Supreme Court, although it is said that a judgment in the County Court would not be obtainable. At present I am not satisfied that that proposition is correct, although I am inclined to think that the County Court Judge, in refusing to issue a summons under sec. 64 of the *County Court Act* 1890 for service out of the jurisdiction, is right. There appears to me, however, to be no reason why a summons should not be granted under sec. 4 of Act No. 959 (sec. 139 of the *County Court Act* 1890). There is nothing inconsistent in the two sections, 64 and 139, but if any inconsistency exists sec. 139, being the later enactment, would prevail. That being so, I am unable to certify. The application will be refused.

Application refused.

Solicitors for plaintiff: *Gavan Duffy & King.*

R. H. C.

[IN CHAMBERS.]

O'DAY v. REID AND COMPANY LIMITED.

1898
June 15.Madden, C.J.

*Practice—Pleading—Embarrassment—Contract, verbal or written—Particulars—
“Rules of the Supreme Court 1884”—Order XIX., r. 4—App. C., s. 5, 1.*

A pleading in the form indicated by the rules is good even though in alleging a contract it fails to set forth whether the contract was verbal or written.
Particulars of these facts will however be ordered to be given.

SUMMONS.

Application by a defendant that a certain paragraph of the statement of claim should be ordered to be struck out as embarrassing, or in the alternative that the plaintiff should be ordered to give particulars of and under the paragraph.

Paragraph 2, the paragraph complained of, ran thus:—“The plaintiff sold to the defendant and the defendant purchased from the plaintiff on or about the 4th of March 1898 one truck of prime wheat at or for the price of 4s. per bushel on the rails at Bungaree.”

Paragraph 4.—“The defendant took delivery of the said wheat, but has not paid the plaintiff the said price or any part thereof. Alternatively, the defendant wrongfully refused to take delivery of the said wheat from the plaintiff, whereby the plaintiff has suffered damage.”

Upon delivery of the statement of claim the defendant applied for particulars of the contract, but the plaintiff refused to give them. The defendant then took out this summons.

Wasley for the defendant—Where a contract is alleged it must be stated whether it is written or verbal. Here a sale is alleged in paragraph 2—that is to say, a contract of sale.

Counsel referred to *Cuttance v. Thompson* (a); *Coldwell v. Hehir* (b).

Bryant for the plaintiff—The pleading is good. It is sufficient to allege a sale without setting out anything more. The form in Appendix C., sec. 5, No. 1, has been followed. The breach of contract is the refusal by the defendant to accept

(a) [1888] 10 A.L.T. 40.

(b) [1889] 11 A.L.T. 57.

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delivery of the wheat. R. 4 of Order XIX. provides that material facts only are to be set out. If an agreement is alleged and a document referred to then the opposite party is entitled to get inspection of the document: Order XXXI, r. 15. The pleading is not embarrassing.

Wasley in reply—Appendix C., sec. 5, No. 1, uses the words “by breach of contract;” here the words used are “sold to the defendant.”

Counsel referred to *Bullen & Leake's Precedents of Pleading* (5th ed.), p. 317.

MADDEN, C.J. The principle enunciated by Hodges, J., in the case of *Coldwell v. Hehir* appears to me to be right from every point of view, because, as he puts it, where a contract is alleged it is a material fact to state whether it was verbal or in writing. If that is not done the result must be that it becomes necessary for a defendant to plead every defence applicable to every class of contract and therefore the defence becomes uselessly swollen in order that the plaintiff may be met at every point. I therefore think to abstain from stating whether an agreement is in writing or not is a breach of the rules. The pleading however in this case is good, because it follows the form prescribed in Appendix C., and it is not entirely clear to me how to apply the principle of the decision mentioned to this case, so as to show that the pleading is bad, inasmuch as the pleader has followed the form which the rule set forth.

I think therefore the proper course will be to allow the form of the pleading to stand and to require the plaintiff to give the particulars asked for. They are material, and it is embarrassing, for the reasons given, for the defendant to be without them.

I allow the summons, with 3*l.* 3*s.* costs.

Solicitors for the plaintiff: *Dugdale & Creber* (for *Tuthill*, Ballarat).

Solicitor for defendant: *W. S. Fergie*.

R. H. C.

[IN CHAMBERS.]

CAYRON AND ANOTHER v. RUSSELL AND OTHERS.

Practice—Interrogatories—Answering Affidavit—Reswearing—Order—Form—Objection—“ Rules of Supreme Court 1884 ”—Order XXXI., r. 10.

An answer to an interrogatory was qualified by a condition. The condition was, by order of a Judge in Chambers, struck out.

Held, that the answer as altered need not be resworn.

Held also, that the deponent could not contend that the answer as altered was not his answer.

After an order is approved by both parties and signed by the Judge objections to its form will not be entertained.

APPLICATION in Chambers.

On the 1st April 1898 an application for further and better answers to interrogatories had been made to Hood, J. It was objected that one of the answers (No. 3) was qualified by a condition, and the defendants' counsel at the hearing stated that he was willing to strike out the condition. Hood, J., made an order. The plaintiffs' solicitor prepared the draft of the order and submitted it to the defendants' solicitor, who made certain alterations in it. The draft with the alterations upon it was submitted to Hood, J., who, after reading the papers, wrote across the draft that he approved of the draft as altered by the defendants' solicitor. The order was accordingly submitted to the Judge, who signed it. The defendants did not, after striking out the condition objected to, reswear their answer. A dispute subsequently arose as to whether the defendants had complied with the order. Application was now made to Hood, J., by the plaintiffs for an alteration in the form of the order, because it did not comply with the order as pronounced, and for an expression of opinion as to whether under that order the defendants should not reswear their answer to interrogatory No 3. The matter was now mentioned to Hood, J., without comment.

Higgins for the plaintiffs.

Hayes for the defendants.

HOOD, J. (after referring to the facts). As to the first ground

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of dispute, I think it is now too late to interfere with the form of the order. It has been drawn up, approved, and signed.

The next dispute is as to whether the defendants have complied with the order. Clearly they have complied with the letter of it, but the point of dispute is whether the defendants should not reswear their answer to interrogatory No. 3, the objection taken to that answer being that it was qualified by a condition. On the hearing before me Mr. Hayes said he was willing to strike out that condition and thus leave the answer unqualified. It is now contended that the defendants should reswear that unqualified answer, as it is said that they might object hereafter that, the answer having been altered, it is no longer their answer. I think that where an affidavit has already been sworn in answer to an interrogatory and a part of the answer is ordered to be struck out by consent the party swearing it can never afterwards say that this was not his answer. I think therefore that the defendants have complied with this order not only literally but in spirit.

I think the order correct in form, and that the defendants have complied with it.

Solicitor for plaintiffs: *J. Woolf.*

Solicitors for defendants: *Willan & Colles.*

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SHAW v. MELBOURNE AND METROPOLITAN BOARD OF WORKS.

Contract—Construction—Condition—Final certificate—Arbitration—Judicial proceeding—Award—Melbourne and Metropolitan Board of Works Act 1890 (No. 1197), s. 79.

In a contract for the performance of certain works it was provided that after certain progress payments had been made to the contractor, no money should be considered to be due or owing to the contractor, nor should the contractor make any claim for or on account of any work executed or maintained by him unless a certificate that the works have been finally and satisfactorily completed and that the balance was due to the contractor had been given by the superintending officer and countersigned by the Engineer-in-Chief.

Under the specification of the works to be done were provisions that certain contingencies were to be provided for by the contractor at his own expense. The superintending officer gave, and the Engineer-in-Chief countersigned, a certificate purporting to be a final certificate, but in the certificate were contained deductions in respect of the matters mentioned in the specification.

In an action by the contractor to recover the amount deducted :

Held (reversing the judgment of MADDEN, C.J.), that the certificate was merely a certificate in respect of the sum therein certified to be due, and was not a final certificate entitling the contractor to recover the balance of moneys alleged to be due to him under the contract.

Per MADDEN, C.J. Sec. 79 of the *Melbourne and Metropolitan Board of Works Act 1890* was not intended to extend the common law liability of the Board of Works.

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ACTION.

Adam Gibson Shaw entered into a contract with the Melbourne and Metropolitan Board of Works for the construction of a sewer, according to specification, and for the performance of certain works and the supply of certain material and labour in connection with the construction of the sewer upon certain defined rates. In the specification it was provided :—

"2. The contractor shall at his own expense shore up, protect and make good, as may be necessary, all buildings, walls, fencing, or other property injured or liable to be injured during the progress of the work, and the contractor will be held responsible for all damage which may happen to neighbouring property from neglect of this precaution, or from any other cause connected with the prosecution of the work."

"9. . . . Care must be taken when maintaining the trenches and work dry that the foundations of the sewers or adjoining buildings are not interfered with. If any damage arises from this cause the necessary repairs must be effected at the sole cost of the contractor."

Among the conditions of the contract were the following clauses :—

"43. If the contractor shall, in the judgment of the Engineer-in-Chief, commit any breach of or shall fail to comply with any of the conditions on the part of the said contractor to be observed or performed, it shall be lawful for the Board either to pursue the remedy, if any, provided herein for such breach, or it may take the whole or any portion of the works out of his hands and enter into another contract or other contracts for their completion or carry them out by day labour at the contractor's expense, or it shall be lawful for the Engineer-in-Chief to estimate and assess the damage and loss that may have arisen or occurred, or be likely to arise or occur thereby, and the Board may deduct the same from any money that may be owing, or may thereafter become due or owing, to the contractor under this contract, or any security in which the same may be invested ; and the contractor shall also be liable, either by way of set-off or otherwise, to pay such sum as assessed as if he had covenanted to pay the same."

"57. Payments, subject to all deductions and reservations herein provided for, will be made at every thirty days or as nearly as may be, as the works proceed, on the certificate of the superintending officer, at the rate of ninety per cent. on the value, in the judgment of the superintending officer, of the work actually done, and fifty per cent. on the value of such materials as may have been approved by him and the balance, subject, however, to the provisions

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hereinbefore contained respecting maintenance, together with the amount deposited as cash security, in thirty days, or as nearly as may be, after the superintending officer shall have certified under his hand that the works have been finally and satisfactorily completed, and that such balance, together with the deposit security, is due to the contractor. . . . But all such certificates given by the superintending officer whether for progress or final payment, must be countersigned by the Engineer-in-Chief before having any force or validity; and should the Engineer-in-Chief be of opinion that the contractor neglects or refuses to execute any order or direction of the Engineer-in-Chief or superintending officer, of whatever nature, in respect to the works of this contract, or to their sufficient rate or progress, or to any other matter or obligation of this contract, he, the Engineer-in-Chief, may at any time refuse to countersign any such certificate or other vouchers until such orders and directions are complied with to his satisfaction by the contractor; and the contractor shall have no claim for any loss, damage, or injury on this account.

“Provided always that no sum or sums of money shall be considered to be due or owing to the contractor, nor shall the contractor make any claim for or on account of any work executed or maintained by him, whether work mentioned in the specification or any extras, additions, enlargements, deviations, or alterations thereto or therein, unless such certificate as aforesaid shall have been given by the superintending officer as aforesaid and countersigned by the Engineer-in-Chief as aforesaid; nor shall any sum or sums of money so certified be considered to be payable to the contractor until the expiration of fourteen days after such certificate or voucher for such payment shall have been countersigned by the Engineer-in-Chief; nor shall any omission to pay the amount of such certificate at the time the same shall be payable be held or deemed to be a breach of or to vitiate or avoid the contract. . . . No claim whatsoever by the contractor will be considered by the Engineer-in-Chief or referred to his arbitration which is not rendered to the Board before the expiration of thirty days after the completion of the contract as certified by the Engineer-in-Chief.

“58. . . . If in the opinion of the Engineer-in-Chief further inquiry is necessary or desirable before any certificate be paid, the Board shall have power to suspend the payment of all or any part of the amount mentioned in any such certificate for a period not exceeding one month from the date at which, in the ordinary course, the money would have been paid.

“59. In the event of any doubt, dispute or difference arising or happening touching or concerning the meaning of this contract, or of the specification or conditions of contract or concerning any certificate, order or award which may have been made by the Engineer-in-Chief or respecting any other matter or thing not hereinbefore left to the decision or determination of the Engineer-in-Chief, or to be governed by his certificate, every such breach, alleged breach, doubt, dispute, or difference shall, from time to time, be referred to and be settled and decided by the award of the Engineer-in-Chief; and to the said Engineer-in-Chief shall also be referred the settlement of this contract and determination of the sum or sums or balance of money to be paid to or to be received from the contractor by the said Board.”

“61. All the awards, directions, decisions, determinations, admeasurements, and valuations of the said Engineer-in-Chief under any part of this contract (which said directions, decisions, determinations, admeasurements, and valuations respectively may be made from time to time) shall be final and binding upon the Board and the contractor respectively from and after the time when the same shall be certified to be final by the Engineer-in-Chief by writing under his hand;

and the Board and contractor do hereby agree respectively to perform, abide by, and submit to the same, and that same shall not be set aside, or be attempted to be set aside or objected to, on account of any technical or legal defects therein, or in the specification of these conditions . . . and it shall not be competent for the contractor or the Board to except in law or in equity to any hearing or determination before or of the said Engineer-in-Chief on the ground of any want of jurisdiction, or excess of authority, or irregularity of proceeding, or otherwise howsoever; but any and all matters made the subject of any such hearing or determination, or decision, and whether of retrospective or prospective operation or effect, shall be deemed both at law and in equity to have been properly submitted to the said Engineer-in-Chief and to be taken to have been properly adjudicated upon.

"62. Neither the contractor nor the Board shall have any power to revoke, annul, or interfere with the authority of the Engineer-in-Chief; and every award, certificate, and order which may be made by the said Engineer-in-Chief, and which shall by endorsement thereon be declared by the said Engineer-in-Chief to be his final certificate, order, or award, shall be final, binding, and conclusive on the parties to this contract, notwithstanding any attempted revocation by either of them or otherwise."

Under this contract the contractor proceeded with the work and was paid in progress payments 66,555*l.* 9*s.* 7*d.* Having, as he thought, completed the work, he wrote asking for a certificate for final payment, whereupon a document (exhibit G 1) was prepared, of which the following are the material parts:—

PROGRESS								
CONTRACT No. 165.—						PROGRESS CERTIFICATE No. 30.		
						<i>Special (a).</i>		
						<i>l.</i>	<i>s.</i>	<i>d.</i>
Brought forward	...	...	...	...	...	70,211	8	10
Maintenance—6 months	...	...	...	...	...	50	0	0
						<hr/>		
Less previous payments	...	...	...	66,555	9 7	70,261	8	10
Retention <i>re</i> damages to buildings by prosecution of works assessed by the Engineer-in-Chief under clause 43 of the Conditions of Contract at 800 <i>l.</i>	...	...	...	800	0 0			
Less amount deducted for work done by Railway Department, as per voucher atttched	...	...	...	138	4 10			
1 <i>l.</i> fine for delay, as per 22nd order of the day, Board Meeting 21st July 1896	...	...	...	1	0 0			
						<hr/>		
						67,494	14	5
						<hr/>		
						2,766	14	5

I certify that the works and materials are satisfactory and that the quantities and measurements are correct.

Pass 2,766*l.* 14*s.* 5*d.*

(Signed) W. THWAITES,
Engineer-in-Chief.

(Signed) CALDER E. OLIVER,
Superintending Engineer.

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The sum of 2,766*l.* 14*s.* 5*d.* was paid by the Board to the contractor, and he now brought this action to recover (*inter alia*) the sum of 939*l.* 4*s.* 10*d.*, being the amounts of the deductions mentioned in the certificate. The defendant Board paid a sum of 390*l.* into Court, without admitting liability, and counterclaimed 570*l.*, of which 500*l.* was alleged to be money paid by the Board after the commencement of the action for damages caused during the progress of the work, and 70*l.* was a sum paid by the Board at the request of the contractor to the Victorian Railways Commissioners for supporting and protecting the Port Melbourne railway line.

The action came on for hearing before Madden, C.J., sitting without a jury.

Other facts material to this report will be found in the judgment below.

Irvine and *Cussen* appeared for the plaintiff.

Duffy and *Fink* appeared for the defendant.

MADDEN, C.J. I think that my dealing with the case would not be bettered by reserving it for further consideration, because I have at the present moment a closer comprehension than I should have again by merely reviewing my notes, and therefore I will proceed to deliver my judgment now. In this case the plaintiff sues for money due to him by the Melbourne and Metropolitan Board of Works for work which he undertook to perform under a special contract with the Board, and as to which he says all the conditions have been performed. He also sues the Board, setting out that his special contract required that as a condition precedent before he could sue, he should have the *final certificate* of the superintending officer, countersigned by the Engineer-in-Chief, certifying that the work has been finally and satisfactorily completed, and that the money was due that he claims. He alleges that he obtained that certificate, and that therefore the condition precedent is performed. The question remains to be decided—the only question in this case—whether the Board was entitled to claim as a deduction a sum of 939*l.* 4*s.* 10*d.*

This question must be approached in this way : in order that the plaintiff may succeed at all, he must show that he has got a certificate such as is contemplated by clause 57 of the conditions of contract—viz., a certificate that the balance, subject to certain conditions concerning maintenance, together with the cash deposit, is due to the contractor, etc. (His Honor read clause 57 of the conditions of contract.) The plaintiff must show such a certificate, and he produces a document here called "Exhibit G 1." What I have to determine first of all is whether "G 1" is a final certificate, or is a balance certificate, as it has been called, within the meaning of condition 57. Its history is this: it has never been and is not now disputed that this contractor, the plaintiff, performed the actual work which he had to perform in a perfectly satisfactory manner to everyone. The engineers all testified that he not only did his work, but persisted in so manful and honourable a manner that while the troubles and the difficulties of it might well have induced him to throw up the troublesome and difficult work he carried it out until he performed it thoroughly. When he got to the end of it he asked them to fix a time when his maintenance should begin, so that, according to the terms of his contract, he would know when it ended. They fixed a date so that it ended on the 10th June 1896. When that time arrived the contractor wrote categorically asking for his final certificate. Pausing here for an instant, I may say that during the progress of the work some houses in Graham-street and one at the corner of Graham-street and Princes-street showed signs of subsidence, and certain damage manifested itself in those houses; the walls cracked, part of the levels of the houses were inverted, and other damages presented themselves. When these presented themselves claims were made by the owners that they had been damaged, and they would look for compensation from the Board. In the contract there were provisions that for damages which arose from the neglect of the contractor to shore up buildings which were damaged, or liable to be damaged, or for any other damage which might occur during the progress of the work, the contractor would be liable as between himself and the Board. Therefore there was an interest in the Board to see that it should save itself against these damages, and there was an

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interest in the contractor naturally to see that his expenditure in respect of anything of that kind should be as small as it could, and he should not pay sixpence more than he was bound to pay. During the progress of the work, and after these claims had been made, the Engineer-in-Chief and the superintending officer both entertained varying views from time to time as to whether there was any obligation upon the Board respecting these damages, and as to the nature of that obligation (if any). They thought that it was very likely that the cause of the subsidence which produced the damage was the withdrawal by the Board of the subsoil water, and, if that were so, they thought there would be no obligation upon the Board to compensate anybody, and further they thought there was no obligation on the part of the contractor to indemnify them. Later they thought it might be otherwise, but that the statute for the limitation of actions against the Board had arisen and matured, and that that would protect both the Board and the contractor. They were all along, as I have said, well disposed to the contractor, and indeed grateful for the way he had performed his contract, and they were anxious to protect him as well as the Board. Consequently an embarrassment arose when the plaintiff demanded his final certificate. At that time the Engineer-in-Chief could not be certain at all whether there was any damage which ultimately would eventuate in an obligation on the Board, and therefore on the contractor. The Engineer-in-Chief was anxious, he said, that the contractor should have all the money due to him that possibly could be released to him, and he was unwilling, manifestly because he was not at all sure that the damage was damage for which the Board or contractor could be liable, that the contractor should spend money on doing work on these houses to remedy the damage done or avert further damage. He was unwilling from a good feeling to the contractor to impose on him an obligation which really and morally it might have turned out ought not to have been imposed on him at all. In that position of affairs he was not prepared to say, as he might have said, to the contractor—“Shore up those houses, and underpin them, and make the damage right, or I will charge you with it.” He might have

done that, but he was unwilling, and he never did do it, and he submits here in evidence afterwards that he never intended and never thought he ought to do it. Bearing that in mind, when the final certificate was asked for the superintending officer and the Engineer-in-Chief set themselves together to produce an instrument which should answer as nearly as possible the demand of the plaintiff. They were both quite satisfied that he had performed the work, and they were also quite satisfied that as far as that is concerned the balance of the contract price was due to him there and then. They also felt satisfied that the penalties which might have been exacted under the contract from him ought not to be exacted except for a nominal amount and the Board, on the recommendation of the Engineer-in-Chief, who recommended 1*l.* as a nominal amount, reduced them to 1*l.* The superintending officer drew up the part of "G 1" which ends with the balance 3,705*l.* 19*s.* 3*d.* He drew it up showing that total amount of the contract was 70,211*l.* 8*s.* 10*d.*, and the maintenance for six months was 50*l.*, and he showed the previous payments to the contractor to be 66,555*l.* 9*s.* 7*d.*, and a balance of 3,705*l.* 19*s.* 3*d.* remaining due. From that he deducted the amount of 138*l.* 4*s.* 10*d.* paid to the Victorian Railway Department, but not paid at that time. The superintending officer inserted this alleged payment for the works of protecting the railway crossing where the sewer constructed by the plaintiff crossed the Victorian Railways, and in respect of which it was alleged the contractor was bound under the contract to recoup the Board, the balance of 3,567*l.* 14*s.* 5*d.* remaining. If that certificate ended there I should say it was clearly a final certificate, although at the head of the instrument it appeared to be the general form of certificate used by this defendant Board—the usual head was "Contract No. So and So," "Progress Certificate No. So and So." In this case the Engineer-in-Chief struck out the word "progress," and then restored it and added the words "Special (a)." This could not be a progress certificate, because a progress certificate is, under clause 57 of the contract, one that awards 90 per cent. of the value of the work actually done. This certificate does not attempt to do anything of the kind, and, therefore, it is not in consonance with the provision that regulates

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such matters. Not only is it inconsistent with the progress certificate, but it is consistent only with what a final certificate would be, and by exhibit "F 1," a letter under cover of which the Engineer-in-Chief forwarded the one to his employers, the defendant Board, he declares that "G 1" is the final certificate to the plaintiff. Therefore it has the complexion of a final certificate; it is inconsistent with a progress certificate, and the man who has the duty of sending it forward calls it a final certificate, and, in my opinion, if the balance of what appears on its face may be disregarded, it is what is called a final certificate. It is countersigned by Mr. Thwaites, the Engineer-in-Chief, and signed by Mr. Oliver, and therefore in that sense it would be a final certificate, but it is said that before it was signed, and after the figures I have already referred to were reached, the Engineer-in-Chief inserted on the face of it this entry: "Retention *re* damages to buildings by prosecution of works assessed by the Engineer-in-Chief under clause 43 of the contract at 800*l*." He deducts that 800*l*. from the balance previously struck, and shows a balance of 2,767*l*. 14*s*. 5*d*. Later on 1*l*. is deducted as and for the nominal penalty which was subtracted, showing a total of 2,766*l*. 14*s*. 5*d*. It is not that of 1*l*., but as to the deduction of 800*l*. and of 138*l*. 4*s*. 10*d*. that this action practically is pursued. It is said by the plaintiff that he has got the final certificate, and he says that the entry on the face of the final certificate as to this item for damages to buildings is entirely unwarranted; that it is bad on its face; that it was a thing which could not be done under any circumstances by the Engineer-in-Chief, and therefore may be wiped out as a mere nullity. It shows clearly on its face it could not be anything but a mere nullity, and it is an attempt at deduction in an instrument which manifests satisfaction that the balance of 3,567*l*. 14*s*. 5*d*. was due—I say nothing for the moment about the railway item—and there is a further statement at the end that the works and materials are satisfactory. The plaintiff says it is in all respects a good final certificate such as is required by condition 57 with a mere blot upon it, and that these damages are altogether wrong. He says that on its face the assessment is bad within the meaning of the contract, and that as a matter of fact if it were good it could not be deducted by the

Engineer-in-Chief, on the face of his final certificate, from the amount of that certificate. The contract gives the Engineer-in-Chief the right to deduct from any money due to the contractor a sum properly assessed under the contract by him, but the final certificate ought not to show on its face any deduction. He has only to assess and recommend to the Board, and the Board has to determine whether they will deduct it from the money due to the contractor. I therefore think, as I have said, that this is a final certificate.

Then comes the question whether this deduction for damages to buildings was a blot. It purports on its face to be done in pursuance of clause 43 of the contract. That provides that (His Honor read it). Now this is the clause under which the Engineer-in-Chief may do the thing which he says he did. The thing he may do is first of all to ascertain whether there had been a breach of the contract or whether the contractor shall have failed to comply with any of the conditions, which probably amounts to the same thing. Now, these are the things he has to investigate. If he thinks that there has been a breach, or if he thinks the contractor has failed to comply with any condition, then he may do any one of the four things I have referred to. He may pursue the remedy of the contract or take the whole or any portion of the works out of the contractor's hands, enter into another contract, or carry out the works by day labour at the contractor's expense, or he may assess the damage or loss that has arisen or may arise thereby. He did not do, and in his evidence he stated he never saw reason to do, any of the first three things. He knew he could only do one, and if he did one he excluded the others. He said he deliberately for a benevolent and kindly reason attempted to assess the damages that had arisen or were likely to arise. Now, to begin with, it is by no means clear that the contractor had been guilty of any breach of his contract. That I shall point to in a moment. Now, whether he had or not, what the Engineer-in-Chief did was this:—Instead of estimating and assessing the damages done to the houses of the claimants by anything which amounted to a breach of the contract, instead of thus confining the damages he assessed, he simply took the damage—as far as on the face of his instrument appears he

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apparently took the damage existing as the damage, valued and charged it against the contractor. Whether it was damage arising from any breach of the contract or partly by that cause and partly by some other cause, the Engineer-in-Chief, in my opinion, was quite wrong. Supposing he had the right of entering upon an assessment under condition 43—having entered upon it he estimated it on a wrong principle for the reason I have already pointed out, that there was considerable doubt whether the damage to these houses was damage in respect of which either the Board or the contractor could be liable. Now the damage for which the contractor should be liable is said to be very large indeed. If the words of the specification are read that would appear to be so. Paragraph 2 provides (His Honor read it). That provision indicates that the contractor has to do certain things: he has to shore up or protect and make good all buildings injured or liable to be injured during the progress of the work, and will be held liable for damage, etc. Now it has been contended for the defendant that those words mean all that from the first glance at them appears. Their generality is so great that they might include any damage to these buildings or properties, but in my opinion these words must be confined to the meaning that the contractor shall be liable for all damage arising during the prosecution of work for which the Board itself would be liable, but for that contract. If it were such damage, then the contractor was to bear the burden and not the Board, but if it be not such damage of course the Board is not liable, and, therefore, the contractor should not be. All reason points to that conclusion, or, if it were not so, any class of general damage to buildings, such as nobody could be liable for at law, would be imposed, for no reason one can conjecture, by the Board upon the contractor. There was no reason for the Board to be afraid or benevolent at the cost of the contractor, and, therefore, it seems unreasonable that they should attempt to impose on him that which should not be imposed either on them or on the contractor. Therefore, I think his liability must be limited to indemnity to pay for damage which otherwise might fall on the Board. If that be so, then the only liability, of course, which the contractor would be responsible for would be such as

would attach to the Board itself under the common law. I do not agree that sec. 79 of the defendant's Act of Parliament was intended to increase this liability. I am quite satisfied that it was intended, as far as might be, to diminish rather than increase this liability, and was, in fact, intended to make the Board liable to make compensation in cases where, by the common law, they would be responsible. Clause 9 of the specification requires that the contractor must keep his trenches dry, so that the foundations of the sewer and the adjoining buildings shall not be injured, and if any damage arises the necessary repairs must be effected at the sole cost of the contractor. That again shows it is damage for which the Board would be responsible. Seeing that this is the kind of damage referred to, it seems that on the face of the instrument the damage to the buildings by the prosecution of the works, and assessed by the Engineer-in-Chief, may include a great deal of damage to buildings from whatsoever cause, although all or part may be damage for which the Board or the contractor cannot be liable. Therefore, on its face, as an assessment it is bad; but, if there had been any doubt, the Engineer-in-Chief has been called, and he in the most candid way has said he never intended in the sense of adjudication to award anything against the contractor by his assessment, so as to affect him permanently, but all he desired to do was to resort to an expedient by which a certain sum of money could be withheld as a guarantee fund in case any one of the claimants succeeded in making good his claim against the Board, and with the intention that the balance by another expedient should be handed back to the contractor. He said he believed this assessment could always be disputed by the contractor, and then he could yield, and any balance coming out of the 800*l.* would be handed back. Although well-intentioned, the course pursued by him was utterly wrong, and therefore the Engineer-in-Chief in this case resorted to clause 43 in an entirely erroneous belief that it was available to him for the purpose he intended to use it for, and consequently, in attempting to use it, he used it wrongly. Therefore, in my opinion, this entry as to damages is quite ineffectual on its face on examination, and on the oral evidence of the Engineer-in-Chief.

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It has been contended that, although the damages might remain, this is as to the earlier part a good final certificate, and as to the latter part a good assessment, but it appears to me it cannot be a good assessment, although, if it were, it might for convenience stand on the same piece of paper as the final certificate. Whether that may be so or not it is bad in every way as an assessment, and therefore appears to be unimportant as such from any point of view in this case.

Then it is said that the Engineer-in-Chief, two months afterwards, finding that there was doubt and difficulty about this matter, determined to set it right by making an award under the same contract. He has very large powers of arbitration, and he set to work to rectify the probable and possible blunder involved in the assessment by making an award which he thought would be conclusive. Accordingly, he made his award. He did not give any notice of any sort or kind to the contractor, nor had the contractor any knowledge of the proposed arbitration. The Engineer-in-Chief had seen little or nothing of these buildings himself. He had seen them once from the outside, and he had heard something, we do not know what, from his officers of the damage done, and on these materials he made his award, awarding practically that 500*l.* was the value of the damage to be deducted by the Board from the contractor's money. 70*l.* was to be deducted on account of the item for the railway crossing, and he awarded that. As to the award it is said that on its face it is bad because it shows (assuming it is an award on subject matter he could enter into, and had entered into rightly, and made an award which might stand) that the 500*l.* is calculated not for the damage arising from a breach by the contractor, but as the value assessed of all damages to the houses themselves by whatsoever cause. The same blunder had occurred in the assessment. It also is said to be bad on its face, and I think it is for the same reason. He has made an award which is inconsistent—that is, having decided in such a manner that the proper amount cannot be separated from what is probably or possibly the wrong amount. Then I think that on examination of the arbitration clause under this contract that as to many things the arbitration is intended to be a

judicial proceeding. I think also that as to some things it may not be a judicial proceeding. In point of fact if one takes condition No. 61 and reads it down to the first semicolon, or rather the second semicolon, I think it may be possible that most of the matters, if not all, which are included in that portion of the conditions do not require a judicial proceeding. They are things which he may certify on his own motion as an expert. I do not say it is so, but it seems to me, from the little attention I have been able to give to it, that up to that semicolon it says it need not be a judicial proceeding as to matters antecedent. I think the first semicolon seems to mark the line, and that subsequent to it plainly, it seems to me, the clause does contemplate judicial proceedings. It is quite certain judicial proceedings are contemplated in some cases. (His Honor read the concluding portion of the condition.) It is impossible for the Engineer-in-Chief to know what was the contractor's contention until he heard what evidence he could give in support of it. It is also provided near the end of this clause (His Honor read it). So that it cannot be contended that this contract has its one universal reference as to all, but that from time to time all matters are to be referable, showing there is a particular something to be brought under his observation as it arises in order to be dealt with by him as arbitrator. Therefore it is plain that some cases are for judicial proceedings, and in my opinion a dispute of this kind is a very difficult judicial proceeding. It is impossible that it can be anything other than a judicial proceeding. It cannot be decided by a man off-hand by himself. I therefore think there never was any arbitration such as is contemplated by this contract.

It is said that the award is also bad because it is not indorsed under clause 62, but in my opinion there is nothing in that contention, because although the word "indorsement" is used it would be quite sufficient to have a specific expression of the Engineer-in-Chief's will under clause 62 on the instrument, whether on the back or front. As long as he says "This is my final certificate," that is sufficient, and that does appear.

I think this disposes of all I need say on the leading features of this case. It has been contended that the final

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certificate is not good because under clause 62 it should have indorsed upon it a statement that it was a final certificate. In my opinion that clause and the clauses immediately in contact with it relate altogether to the arbitration which is contemplated by the contract. I think also that the argument of Mr. Irvine is unanswerable. The contract provides that progress certificates should not be final. In addition to that I think clause 57 prescribes all that is intended to be said about the certificate for progress payment and balance payment of the money. Arbitration refers to other things, and such disputes as may arise in respect of these; but if the contractor gets the superintending officer's certificate for the balance countersigned by the Engineer-in-Chief it appears to me he has got all he requires for the purpose of bringing his action, and the fact is notable that the language of clause 62 is not negative. It does not say a certificate shall be bad, but for the purpose of shutting every person's mouth if it has been so indorsed it is final. That establishes thus much—the plaintiff is entitled to 3,705*l.* 19*s.* 3*d.*

It is contended that a further item of 138*l.* 4*s.* 10*d.* was paid to the Railway Department. The defendant as to that item claimed it in its defence originally in a way that does not agree with the evidence at all. It is said the contractor was bound to have protected the railway line under his contract, and that he did not and the railway line was damaged. The evidence is that he was never asked to protect the railway line, but the Railway Department itself protected that line by an arrangement with the Board, not consulting the contractor, and that the Board agreed to pay the Railway Department, with the intention themselves of deducting the amount from moneys coming from them to the contractor. That being so, the plaintiff never did anything to the crossing, and his neglect did not cause any damage, because the crossing was amply protected by the Railway Department when he passed beneath, and therefore the contention is, if that is the case, it did not need it; but there has been an amendment of the pleadings which counter-claims an item of 70*l.* in respect of this protecting of the railway crossing. The Engineer-in-Chief thought that although the

Board paid 138*l.* 4*s.* 10*d.*, 70*l.* is a fair charge against the contractor, and he attempted, as I say, in his award to award that, but now that item is claimed in the counter-claim. It has troubled me very much indeed, because the matter involves a very nice point of law, but the substantial transaction is one in which the contractor knew what his obligation was. I am inclined to think, on the whole, he must have been reminded of it by Oliver, whose recollection was not keen, and whose hesitation was considerable, and who said it is alleged that he told the contractor that they had arranged to do the work. I think I should accept the view that he was told of it. I am inclined also to think that as he said nothing, and allowed the work to go on that he was to do, it would be a fair inference that he allowed the others to believe that he was consenting. I therefore think the defendant was entitled to deduct 70*l.*, which was a portion of the 138*l.* 4*s.* 10*d.* paid by them. Then in the same counter-claim there is now claimed a sum of 500*l.* in respect of the moneys paid by the Board to these various claimants for the damage done to their houses. Now as to that—according to the definition I have placed on clause 62 the defendants were bound to show that the damage in question was damage for which they were responsible and which responsibility they could therefore put on the contractor. In my opinion they have failed in that entirely. If one takes their own evidence alone, so far as it affirmatively supports their plea it is of the vaguest description. According to their evidence they cannot determine whether the damage might have been wholly caused by the withdrawal of subterranean water or partly by it. The burden is on them to show that there was liability on them to pay these damages in order to charge the plaintiff, and they have failed, and on that part of the counter-claim they cannot recover. Therefore, in my opinion, the plaintiff was entitled to recover the difference between 70*l.* and 938*l.* 4*s.* 10*d.* I take off the 1*l.* This leaves 868*l.* 4*s.* 10*d.* In pointing to the several things which under condition 43 the Engineer-in-Chief might have done in the circumstances which arose and embarrassed him, I omitted to point out that under clause 59 there is an express authority

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given to him to withhold his final certificate without being responsible in any way to the contractor for doing so, and that, therefore, there was a safety valve which he might have resorted to in the circumstances which embarrassed him, in order to ascertain what he should do in order to protect his Board from the then non-existing liabilities for damage, but which liabilities might later on mature into real liability. I intended to have cited *Hudson on Building Contracts* (2nd ed.), p. 281, a book which appears to be a very admirable compilation of the law relating to contracts. This is an authority that once a final certificate is issued, though it blunders in point of fact, it is, nevertheless, not revocable or amendable even by the Engineer-in-Chief himself. Therefore once he issues a final certificate, although it may involve immense errors in conception and making up, it is not amendable. The learned author cites *Adams v. Great North of Scotland Railway Company (a)*. I think the authority reported scarcely goes the entire length the learned author quotes it for.

Judgment for the plaintiff for 868*l.* 4*s.* 10*d.*

From this judgment the defendant appealed.

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Isaac A. Isaacs (A.G.) and *Fink* (*F. G. Duffy* with them) for the appellant—The certificate exhibit G 1 is not one for the larger amount. It is necessary, in order to enable the plaintiff to succeed, that he should have obtained a certificate for that amount. There has been a failure on the plaintiff's part to comply with condition 57. The Engineer-in-Chief says he has the right to assess the amount of indemnity payable by the contractor to the Board for not shoring up, etc. Assuming this was a final certificate, it is bad under clause 43 of the conditions of contract. The Engineer-in-Chief admitted that he had no materials upon which to form a judgment as to the correct assessment. What he did was to take the whole of the claims sent in, whether they could be recovered or not, or whether the contractor was obliged to pay or not, and for present purposes recommended that 800*l.* be retained as an interim sum for a guarantee fund to cover any liability.

(a) [1891] App. Cas. 31.

Irvine and Cussen for the respondent—The question is whether the facts mentioned in clause 57 have been certified to and countersigned for. The Court should look at the contract first and not at the certificate. The contract where doubtful should be construed in the contractor's favour. The Engineer-in-Chief has to certify to two facts—have the works been finally and satisfactorily completed—and he does so in so many words in the certificate which provides for the payment of the whole amount certified for; a thing he could not do unless he were giving a final certificate. The words "less 10 per cent." distinguish this certificate from a progress certificate. The work was done. The term "works" under this contract does not mean the performance of everything under the contract. Clauses 61 and 62 show what is meant by a final certificate. As to the capacity in which the Engineer-in-Chief signed the certificate, see *Young v. Schuler* (b). The same principle was affirmed by the Full Court in *Ellis v. Horsley* (c), where the town clerk was found to have certain duties under a statute and had to certify to the signing of a petition. The Court held that the certificate was right in form, but that the evidence showed that the town clerk never purported to act within his powers.

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WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, HODGES, and HOOD, JJ.] This is an appeal from a judgment of the learned Chief Justice, in which he ordered that judgment be entered for the plaintiff for the sum claimed by him, viz., £938 4s. 10d., less a sum of 70l. The main defence and the sole defence to which we need refer is set out in paragraph 6 of the statement of defence. "It was provided by clause 57 of the conditions of the said contract that no sum or sums of money should be considered to be due or owing to the contractor, nor should the contractor make any claim for or on account of any work executed or maintained by him, whether work mentioned in the specification, or any extras, additions, enlargements, deviations, or alterations thereto or therein, unless such certificate as is referred to in the said clause should have been given by the superintending officer and countersigned by the Engineer-in-

(b) [1883] 11 Q.B.D. 651.

(c) [1898] 23 V.L.R. 609.

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Chief, as in the said clause provided. No such certificate has been given by the superintending officer, or countersigned by the Engineer-in-Chief, as required by the said clause in respect of the said sum of £938 4s. 10d., or any part thereof."

Now, the Chief Justice has found the issue raised by that paragraph in favour of the plaintiff—that is to say, that he had obtained the certificate, and that, therefore, that defence was not available for the defendant. He therefore held the plaintiff entitled to recover the amount claimed. It is upon that question we do not agree with the Chief Justice, and this particular question goes to the root of the whole cause of action.

The certificate relied upon is exhibit G 1. Before I refer to the certificate itself it is right I should draw attention to certain clauses or conditions of the contract relating to that certificate, and to the right of the plaintiff to recover the sums of money alleged to be due or owing to him.

The principal clause is 57, which provides the manner in which payment is to be made. Payments are to be made from time to time at the rate of 90 per cent. of the amount then due upon the work done, and so on; "and the balance, subject, however, to the provisions hereinbefore contained respecting maintenance, together with the amount deposited as cash security, or the equivalent thereto, in thirty days, or as nearly as may be, after the superintending officer shall have certified under his hand that the works have been finally and satisfactorily completed, and that such balance together with the deposit security is due to the contractor." And then, further on, the same clause proceeds—"But all such certificates given by the superintending officer, whether for any progress or final payment, must be countersigned by the Engineer-in-Chief before having any force or validity." Then again, further on in the same clause comes a proviso:—"Provided that no sum or sums of money shall be considered to be due or owing to the contractor, nor shall the contractor make any claim for or on account of any work executed or maintained by him, whether work mentioned in the specification or any extras, additions, enlargements, deviations, or alterations thereto or therein, unless such certificate as aforesaid shall have been given by the superintending officer as aforesaid, and

countersigned by the Engineer-in-Chief as aforesaid." Now, that being the stipulation in the contract relative to this certificate, the question arises whether the plaintiff has got that certificate—in other words, has he obtained the certificate entitling him to payment of the sum of money he claims; or whether the defendant's pleading I have read is sustained—viz., that he has not obtained the certificate? The question depends upon the view we take of the certificate itself and of the evidence relating to it so far as this evidence is admissible.

The document relied upon—Exhibit G 1—is a certificate, and as it stands appears to consist of two documents, both of which are before me. One, it is true, has been cancelled and another substituted for it, owing to the fact that 1*l.* was deducted for penalties, but the cancelled document showed the value of the work done to be 70,261*l.* 8*s.* 10*d.* It then sets forth the amount of the previous payments at 66,555*l.* 9*s.* 7*d.* It then deducted an amount for work done by the Railway Department, as per attached voucher, 138*l.* 4*s.* 10*d.*, leaving a balance of 3,567*l.* 14*s.* 5*d.* Then on the face of it appears a further deduction, "Damages to buildings by prosecution of works assessed by the Engineer-in-Chief under clause 43 of the conditions of contract at 800*l.*," leaving a balance of 2,767*l.* 14*s.* 5*d.*, after deducting the penalties altogether. That is what appears on the face of the document, and that is signed by Oliver, the superintending engineer, and countersigned by the Engineer-in-Chief by means of the words "Pass 2,767*l.* 14*s.* 5*d.* W. Thwaites." The certificate states that the works and materials are satisfactory, and that the quantities and measurements are correct. Now, without laying too much stress on the point, I wish to draw attention to the fact that this certificate is not in the form prescribed by clause 57. That clause expressly provides that "the superintending officer shall have certified under his hand that the works have been finally and satisfactorily completed," but the certificate says "that the works and materials are satisfactory and that the quantities and measurements are correct." This is a certificate which I may describe as one for progress payments, and is not the certificate mentioned in clause 57 for the balance. The Engineer-in-Chief having countersigned for 1*l.* too much, another document was

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prepared very much to the same effect, except that the error was corrected and the Engineer-in-Chief countersigns it "Pass 2,766*l.* 14*s.* 5*d.*" Looking at that document alone we think that if it be a balance certificate within the meaning of clause 57, assuming that fact in plaintiff's favour, it is a balance certificate which states that what the Engineer-in-Chief countersigned as being due to the contractor, what he is prepared to vouch for by his signature as being due to the contractor and as being the amount which the defendant should pay to the contractor, is 2,766*l.* 14*s.* 5*d.* The reason, apparently, why he is prepared to countersign only for the less amount is that he knows that there are claims outstanding against the Board for damage to buildings by reason of the failure of the contractor to carry out satisfactorily the specification which provides that the contractor must shore up buildings and take every other precaution against damage to buildings. The specification also provides that in the event of damage caused to other buildings the contractor shall be responsible to the Board for the damage so occasioned. In other words, it is provided in the specification that the contractor shall do this work at his own expense, and if he does not that he shall recoup the Board for the damage they should have to pay. The Engineer-in-Chief having this fact in mind, that claims against the Board were outstanding, thought it necessary when framing this certificate to make some provision for reimbursing the Board for the damage they might sustain by reason of these claims. He, in effect, takes up the position "I cannot say either that the works have been finally and satisfactorily completed, or that the contractor is entitled to 3,567*l.* 14*s.* 5*d.*, because if those claims be established against the Board it will have to pay them, and the contractor in that event will have to recoup the Board. I must, therefore, make allowance for such a state of things, and until these claims are more accurately ascertained I can only countersign a cheque for the less amount, that is for 2,766*l.* 14*s.* 5*d.*, the amount claimed by the plaintiff less 800*l.*" This is the view we take of the document itself.

Then the question arises—Does the evidence, so far as it goes, sustain that view? The most important evidence is that of the Engineer-in-Chief himself, who countersigned, when stating his

intentions in reference to this document. He said:—"I remember sending exhibit G 1 with letter to plaintiff. I do not care what the document was called. Leaving out the words as to damage, I intended to convey to the Board that all the items summed up in 70,211*l.* 8*s.* 10*d.* were well and satisfactorily completed, and that the 50*l.* for maintenance was properly paid; also, that 66,555*l.* 9*s.* 7*d.* was the amount of previous payments to the contractor." Then comes this important statement by him: "And that, apart from deductions for damage and railway claims, 3,705*l.* 19*s.* 3*d.*, was then due to the contractor. I did not require the plaintiff to do any further work to railway crossing than the railway people had done. Apart from any work to be done by plaintiff to injured buildings, I desired to convey to the Board that no further work remained to be done by plaintiff under the contract." What do these words mean? They mean that, having regard to the document 3,705*l.* 19*s.* 3*d.*, less 800*l.*, was, in Mr. Thwaites' opinion, then due to the contractor—the latter sum being deducted as a necessary corollary of the Engineer-in-Chief's evidence, the truth of which has not been questioned. Later on he says:—"I intended it for a final certificate down to the balance of 3,705*l.* 19*s.* 3*d.* I had to ascertain what was due to the contractor, and then I had to deduct from that what the Board was entitled to deduct." Further on he says:—"I do not say that the plaintiff committed a breach of the contract, but he did not comply with the conditions of the contract by not making good the damaged buildings. I might have declined to give a final certificate till the buildings had been made good, or I might have carried them out at the contractor's expense, or I might have assessed the damage against the contractor." Further on he says:—"I found that he was entitled under the contract to the '3,705*l.* 19*s.* 3*d.*, and the Board was entitled to deduct the amount assessed by me and the railway claim. I assessed the 800*l.* under condition 43 by the writing on the face of exhibit G 1. I took the then damages, and the prospect of damage which might arise on contract. I added up the total of all the claims we had, and also some items in respect of which we had not got any claim, but had had a general notice of claim." Now, we think that, considering the document itself, the effect of

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that evidence is that this was not the "balance certificate" contemplated and provided for in clause 57 of the conditions of contract, and not only was it not that balance certificate, but it was never intended to be, except in respect of the less sum 2,766*l.* 14*s.* 5*d.* No doubt it may have been intended to be a balance certificate for that amount, but not for the amount sued for, and the contractor must have a certificate for the latter amount, otherwise he cannot recover. This is a view which might certainly have presented itself to the Engineer-in-Chief. He might say that the taking of these precautions—shoring up, etc.—is part of the contract, and is in the specification. The contractor has got to do all this at his own expense, and if he do not and damage result, it is also provided in the same clause that he is to be responsible to the Board. In other words, if the Board pays the damage he has to repay the Board. The Engineer-in-Chief, having all these matters before him, probably took up the position that he ought not to countersign the balance certificate under clause 57 without making some provision for the protection of the Board. In all probability if he had been asked to countersign for the larger sum he would have refused. He would have insisted upon making some provision for the deductions. As this view is one which goes to the root of the whole cause of action, it will not be necessary for us to decide any other question. We think the judgment of the Chief Justice is wrong upon this point. The appeal will be allowed, with costs. Judgment will be entered for the defendant, with costs. The plaintiff will have the costs of any issues of fact in which he has succeeded.

Appeal allowed.

Solicitor for plaintiff: *E. E. Dillon.*

Solicitors for defendant: *Fink, Best & Hall.*

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Criminal law—Admissibility of evidence—Evidence of criminal acts other than those charged.

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A prisoner was charged with the offence of maliciously wounding with intent to do grievous bodily harm. At the trial it was proved that a constable saw the prisoner with a bag, stopped him and asked him where he was going; that the prisoner thereupon ran away, but was caught by the constable and brought back, and when the constable began to examine the contents of the bag the prisoner ran away again, and on being pursued turned round and struck the constable on the head. The bag contained 19 pigeons and a claw-hammer. The prisoner escaped, but was afterwards arrested. A question of the identity of the prisoner was raised at the trial. For the prosecution a witness gave evidence that he had been robbed of 19 pigeons and a claw-hammer the night before the offence charged; that the pigeons were returned to him, but that he could not identify the prisoner nor the claw-hammer. The jury found the prisoner guilty of unlawfully wounding.

Held, that the evidence of the theft of the pigeons and claw-hammer was admissible.

Per A'BECKETT, J. That even if such evidence were inadmissible it was of such a nature that it could not affect the mind of the jury to the prejudice of the prisoner upon the charge of maliciously wounding with intent to do grievous bodily harm.

Makin v. Attorney-General of N.S.W. ([1894] A.C. 57) discussed.

THIS was a rule *nisi* for a *mandamus* calling upon Hood, J., to show cause why the following question should not be reserved for the opinion of the Full Court:—Was Brockwell's evidence given at the trial for "maliciously wounding" admissible?

John Ludlow was tried at the February sittings of the Supreme Court in its criminal jurisdiction, before Hood, J., and a jury on a charge of maliciously wounding with intent to do grievous bodily harm, and was found guilty of unlawfully wounding and sentenced to 18 months' imprisonment with hard labour. The evidence, as far as is material, was to this effect:—

William Brockwell, called for the prosecution, said that 19 pigeons and a claw-hammer were stolen from his premises at Clifton Hill on the 24th March 1897; that the pigeons were returned to him two or three days afterwards by a sergeant of police; that he sold them at the market three weeks afterwards; and that he could not identify either the claw-hammer or the prisoner.

Constable Maloney said that about two o'clock on the morning of 25th March 1897 he saw the prisoner in Collingwood with a

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bag upon his back ; that he asked the prisoner where he was going ; that the prisoner immediately dropped the bag and ran away, but was brought back by the witness ; that when the witness was looking into the bag the prisoner again ran away, and being pursued by the witness struck the witness on the head with something hard and escaped, but was subsequently, on the 15th January 1898, arrested by the witness and another constable.

Constable Vickers said that he was with Constable Maloney on the morning of 25th March 1897, when the prisoner was met with ; that he examined the bag dropped by the prisoner and found therein 19 pigeons, and that he later on picked up a claw-hammer.

The question of the identity of the prisoner was raised at the trial.

Hood, J., having been asked to reserve a question for the Full Court as to whether the evidence of the larceny of the 19 pigeons and the claw-hammer was admissible in evidence, refused to do so. This rule *nisi* was then obtained.

Fink for the Crown showed cause—The evidence of Brockwell was properly admitted as showing the prisoner's intent. It is more probable that a man who had committed a crime and had the proceeds of the crime in his possession would, in his attempt to escape, intend to do grievous bodily harm to his pursuer than an innocent man.

He referred to *Stephen on Evidence* (4th ed.), p. 9 ; *R. v. Clewes* (a).

Fisher for the prisoner moved the rule absolute—Brockwell's evidence went to prove a felony totally distinct in kind and in time from that for which the prisoner was being tried. It was quite irrelevant. The only object with which it was given was to show that the prisoner, having committed one crime, was a person likely to commit another. The charge was a distinct one, and should have been kept free from evidence tending to show the commission of another crime. Such evidence could only

(a) [1830] 4 C. & P. 221.

have one effect on the minds of the jury, namely, to prejudice their minds against the prisoner. The principle of law is laid down in numerous cases, and any encroachment upon this principle, which alone can insure a fair trial, should be guarded against. The evidence was evidence which would have been properly admissible to convict the prisoner of larceny of these pigeons. Pigeons were stolen, they were found in the prisoner's possession, and as that evidence is clearly admissible upon that charge, it is clearly inadmissible upon any other charge.

Counsel referred to the following cases:—*Makin v. The Att.-Gen. of N.S.W.* (b); *Reg. v. Miller* (c); *R. v. Ellis* (d); *Reg. v. Cobden* (e); *R. v. Folkes* (f); *Reg. v. Trueman* (g); *Reg. v. Dungey* (h); *Reg. v. Giddens* (i); *Reg. v. Bleesdale* (k); *Reg. v. Hinley* (l); *Reg. v. Ziegert* (m); *R. v. Rooney* (n); *R. v. Westwood* (o); *Reg. v. Oddy* (p); *R. v. Birdseye* (q); *Reg. v. Holt* (r); *Reg. v. Fuidge* (s); *Reg. v. Butler* (t); *Reg. v. Gibson* (u).

MADDEN, C.J. In this case we granted a rule *nisi* for a *mandamus* calling upon our brother Hood to reserve a case for this Court. With further time for reflection, and having received further assistance from counsel upon this important principle in the conduct of criminal trials, we think that the evidence which is challenged was properly admitted. A large number of authorities were cited to us to uphold a principle about which there is not the slightest doubt, namely, that where on a trial for one criminal offence evidence is tendered of another and distinct offence from that with which the prisoner is charged, and the evidence of that distinct offence is not essential or relevant to the proof of the offence with which he is charged, the evidence so tendered is not legally admissible and must be

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(b) [1894] A.C. 57.

(c) [1895] 18 Cox C.C. 54.

(d) [1826] 6 B. & C. 145.

(e) [1862] 3 F. & F. 833.

(f) [1832] 1 Moo. C.C. 354.

(g) [1839] 8 C. & P. 727.

(h) [1864] 4 F. & F. 102.

(i) [1842] Car. & M. 634.

(k) [1848] 2 C. & K. 765.

(l) [1843] 2 Moo. & R. 524.

(m) [1867] 10 Cox C.C. 555.

(n) [1831] 7 C. & P. 517.

(o) [1831] 4 C. & P. 547.

(p) [1851] 2 Den. C.C.R. 264.

(q) [1830] 4 C. & P. 386.

(r) [1860] Bell C.C. 280.

(s) [1864] 33 L.J.M.C. 74.

(t) [1848] 2 C. & K. 221.

(u) [1887] 18 Q.B.D. 537.

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excluded. Within that rule falls that class of cases where an attempt is made on the trial of a man for one offence to give evidence of another and wholly different offence committed at a wholly different time, with the view of showing that the prisoner, being a man of a particular character, is very likely to have committed the offence with which he is then charged. Evidence of that sort is always excluded, because according to our law the fact that a man has committed one offence is no logical ground for concluding that he will commit another. Unless there is a distinct correlation between the two offences essential to the establishment of the guilt of the prisoner, evidence establishing the earlier offence ought not to be received on a trial for the later, and, if received, may very well be a ground for quashing the conviction. For all that, it must be borne in mind that it may well happen that the whole essential evidence to establish the crime with which the prisoner is charged, may consist of circumstances which establish the committal of another crime by the prisoner. To say that because the evidence which would prove the offence under consideration is connected with the evidence of another offence with which the prisoner is not charged, the prisoner should therefore not be convicted—that because by reason of the villainy of the prisoner in doing the acts which made the offence with which he is charged criminal, he has laid himself open to a prosecution for another offence, evidence of these acts should not be received—is absurd. If such were the case, then the greater the villainy of the prisoner, the less chance would there be of his being convicted, because by his villainy he had precluded evidence being given against him. The rule is discussed in *Makin v. Att-Gen. for N.S.W. (v)*. There the Lord Chancellor after alluding to the kind of evidence not admissible, says:—“On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the act alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would other-

(v) [1894] A.C. 57.

wise be open to the accused." Now, that is a statement of the principles upon which evidence which in effect would be sufficient to prove another and a different offence might be admissible in order to prove the elements going to make up the offence charged.

The question is, whether the evidence here objected to could have that effect. The prisoner was charged with maliciously wounding with intent to do grievous bodily harm. The essence of that offence is the wounding and the intent that the wound should be so grievous as to amount to grievous bodily harm. Therefore the object and the extent of that object which the prisoner had in mind in striking the constable was plainly matter for evidence. A man who is stopped in the street by a mere intruder might knock him down to show his resentment for the undue interference, but it is much more likely that a man whose liberty is at stake, who knows that if he does not escape he will be convicted of an offence, that man has a motive in wounding and disabling the person arresting him. Therefore it becomes a question what is the frame of the man's mind. Was he trying to escape because he thought that the man had no right to interfere with him, or was he afraid that if interfered with and arrested he might be sent to gaol? The jury may consider that, and in order to test that it would be evidence to show that the prisoner had recently robbed a pigeon-house and that he had pigeons in his possession at the time, and that if the pigeons and himself were thus detained he might be convicted. We therefore think that the evidence was admissible as to his intent. It was presented by the Crown and admitted by the Judge in order to meet the possible defences the prisoner might resort to. First, he might have said, "You cannot identify me, but if you do succeed in identification I am only guilty of the lesser offence. I had no motive to do grievous bodily harm." Apparently the jury took that view, because they found him guilty of the lesser offence. We think it would be impossible to say that the evidence was inadmissible; we think it was rightly received. I am inclined to think that the view put forward by my brother A'Beckett during argument may also be a ground for sustaining the conviction. It was said

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that Brockwell's evidence by itself amounted to nothing—it was a mere by-the-way assertion that he had lost 19 pigeons and a claw-hammer. If it rested there it could hurt no one ; if the prisoner was identified as the person who stole the pigeons and hammer, then that evidence would be proper to identify him upon the issue of identification as the man who stole the pigeons and assaulted the constable. If not, then Brockwell's evidence would be of no harm and the jury could not convict of unlawfully wounding if such charge was not before them upon such evidence. I prefer to put the ground of my decision upon that which I have previously stated. The case I have referred to, *Makin's Case*, seems to put the case into the category of cases in which the judgment ought not to be disturbed although evidence legally inadmissible has been admitted. At page 70 the Lord Chancellor says :—" Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as, for example, where some merely formal matter, not bearing directly on the guilt or innocence of the accused, has been proved by other than legal evidence." I say that if there was evidence that the prisoner committed a larceny as well, the jury might be disposed to say that, while disregarding the cogent evidence as to Brockwell having lost the pigeons and the prisoner being found with them, "the prisoner having committed that piece of rascality might commit any other piece of rascality, and therefore we will convict him," that evidence would be inadmissible. Still, I am inclined to think that in this case the evidence was really of so little importance that the conviction might be sustained on the other ground also. The rule *nisi* will be discharged.

HOLROYD, J. I desire to add a few words. I agree with Mr. Fisher in his contention that wherever evidence is admitted against a prisoner which is not legally admissible and is left to the jury and they find him guilty, the conviction is bad ; but I make this one exception, that the evidence which was left to the jury and which was not legally admissible must have been

evidence which would or might have affected the verdict of the jury, and not evidence which could not have had any effect whatever upon the verdict. Further than that I think it is not necessary to comment upon the case cited in support of that proposition—*R. v. Gibson*. The evidence of Brockwell, which was objected to, simply amounted to this: that a larceny of 19 pigeons and a claw-hammer had been committed on his premises on the 24th March 1897; that the pigeons were returned to him after two or three days by a sergeant of police; that he subsequently sold the pigeons in the market; and that he could not identify the prisoner or the claw-hammer. The first part of that evidence was part of the evidence which would have been necessary to prove the commission of the larceny by the prisoner. It could not have been properly admitted on his trial for maliciously wounding with intent to do grievous bodily harm unless it had been relevant to the issue upon that trial. The passage quoted by the learned Chief Justice from *Makin's Case* clearly states the cases in which evidence of the commission of another crime, which would include evidence tending to prove the commission of another crime, is admissible as relevant to the issue, viz., either if it bears on the question whether the acts alleged to constitute the crime were designed or accidental, or serves to rebut a defence which might be raised. Now in this case the prisoner was charged with wounding with intent to do grievous bodily harm. The jury found him guilty only of unlawfully wounding. The prisoner might have set up the defence that his striking the constable was merely accidental, or that he was not guilty of wounding with intent, but only of unlawfully wounding, as the jury ultimately found. To disprove that anticipated defence, it was of importance to show that the prisoner had the strongest ground for resisting his arrest, and that in order to prevent his arrest he would have been willing, not merely to maliciously wound, but to disable the constable. Upon that ground and for that purpose it was proper to show that the larceny had been committed. It is possible that the prisoner might have defended himself by saying—"I was conscious of my innocence, and I thought I would serve the man out for stopping me. I had not

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the slightest intention of doing him any serious harm, but merely intended to hurt him as he deserved." It would be important, in order to destroy this anticipated defence, to show that he was a guilty man—that he had committed a crime, and had the strongest motive when chased to prevent the constable from pursuing him further by disabling him. That is the reason for which I think this evidence was properly admissible. I do not wish to express any opinion about the view put forward by my brother A'Beckett.

A'BECKETT, J. The view which I take, upon which I think this rule should be discharged, quite apart from the question of the admissibility of the evidence on the grounds already stated, is that, consistently with everything in *R. v. Makin*, the evidence which was objected to could not have affected the minds of the jury to the prejudice of the prisoner, and for this reason: The evidence objected to went to show that a robbery had been committed by someone. It did not point to the prisoner as the person who had committed the robbery. The prisoner was tried for maliciously wounding with intent. The prisoner denied his identity with the person who wounded the constable, and as to that charge of wounding there was ample legal evidence upon which the jury were at liberty to proceed. Until the jury had on that legal evidence come to the conclusion that the accused was the person who had wounded with intent, the evidence of the robbery of the pigeons would not attach to him more than to any other person. The jury would have been not merely persons unable to estimate the weight of evidence, but absolute idiots, if they supposed that the assertion that a man had been robbed by someone, he did not know by whom, pointed to the fact that the prisoner was the man who was guilty of wounding. In dealing with a case like this I think the Judge is not to deal with the evidence as if the jury were lawyers, but he should not deal with it as if they were idiots who would act upon evidence which to no reasonable mind could prejudice the prisoner. The evidence in question could not have related to the prisoner unless the jury were satisfied that he was the man who had wounded the constable. The mere fact that when they found that the

prisoner was guilty of wounding they had also before them evidence from which they could come to the conclusion that he had also committed another crime would not make that evidence legally inadmissible. To my mind it was evidence which could not possibly prejudice the prisoner, inasmuch as it could not identify him with the man who committed the theft until other evidence had identified him as the man who wounded the constable. For that reason, in addition to what has been urged, and quite consistently with everything which was said in *R. v. Makin*, I think the order *nisi* should be discharged.

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Order nisi discharged.

Solicitor for Crown : *Guinness*, Crown Solicitor.

Solicitor for prisoner : *Fisher*.

W. H. M.

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Criminal law—The Crimes Act 1890 (No. 1079), s. 56—Abortion—Supplying drugs with intent that they should be used to procure abortion.

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A prisoner was tried on a presentment framed under sec. 56 of the *Crimes Act* 1890 for supplying a noxious thing, knowing that the same was intended to be unlawfully used or employed with intent to procure a miscarriage. The evidence showed that the police laid a trap to catch the prisoner, and wrote a letter stating that a woman was three months with child, and asking for something to cure her, but there was no such woman in fact. In reply, the prisoner, believing that there was such a woman, sent certain pills containing half a drop of a certain drug. Witnesses for the Crown described the pills as being dangerous to a pregnant woman; they might injure one woman, though not another. Witnesses for the prisoner stated that the pills were harmless. The learned Judge, in directing the jury, told them that the offence charged might be committed although there was no existing woman in question, and that the prisoner would be guilty if he unlawfully supplied a poison or noxious thing knowing or believing at the time that it was intended to be used with the intent of procuring a miscarriage, even though it now appeared that no such intent actually existed in anyone's mind, and that the prisoner's belief as to the effect of the thing supplied was beside the question, for if he unlawfully supplied a noxious thing, knowing or believing it was to be used for an unlawful purpose, his opinion that such thing was not noxious would not excuse him. The prisoner was convicted.

Held, per MADDEN, C.J., HOLROYD and HODGES, JJ. (WILLIAMS, A'BECKETT, and HOOD, JJ., dissenting), that the direction to the jury was wrong, and the conviction should be set aside; WILLIAMS, J., affirming the conviction, on the

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ground that *Reg. v. Hillman* (9 Cox 386), being a decision of the Criminal Court of Appeal of England, should be followed.

Reg. v. Drake (13 V.L.R. 498) overruled.

Reg. v. Hillman (9 Cox 386) and *Reg. v. Tiley* (14 Cox 502) not followed.

THIS was an order *nisi* for a *mandamus* to compel Hood, J., to state a case for the opinion of the Supreme Court under the *Crimes Act* 1890. Upon the return of the order *nisi* it was arranged that in place of affidavits being used the learned Judge should state a case for the use of the Court in the same form as if the case were being heard upon a case stated in the usual way under the *Crimes Act* 1890. The following was the case stated:—

“The prisoner was tried before me at the July Criminal sittings on a presentment framed under sec. 56 of the *Crimes Act*. This presentment contained two counts—the first for supplying a poison, and the second for supplying a noxious thing. The jury acquitted on the first count and convicted on the second. It appeared from the evidence that the police laid a trap to catch the prisoner. A letter was written to him, stating that a woman was three months with child, and asking for something to cure her, but there was no such woman in fact. In reply, the prisoner, believing that there was such a woman, sent certain pills, each of which contained half a drop of oil of savin. It was stated by a witness that oil of savin has abortifacient properties, and that it is a poison, but that half a drop would not injure anyone nor be poisonous by itself or in one dose. The pills were described by the Crown witnesses as being in the dose prescribed dangerous to a pregnant woman, especially if she were advanced in pregnancy. They might injure one woman and not another, and ought never to be given to a pregnant woman, as they might produce abortion in a sensitive pregnant woman. The prisoner’s witnesses stated that the pills were harmless. I told the jury, *inter alia*, that the offence might be committed although there was no existing woman in question, and that the prisoner would be guilty if he unlawfully supplied a poison or noxious thing knowing or believing at the time that it was intended to be used with the intent of procuring a miscarriage, even though it now appeared that no such intent

actually existed in anyone's mind, and that the prisoner's belief as to the effect of the thing supplied was beside the question, for if he unlawfully supplied a noxious thing knowing or believing that it was to be used for an unlawful purpose, his opinion that such thing was not noxious would not excuse him. On the first count I told the jury that if the substance supplied was a poison, commonly so called, I thought it immaterial what the quantity was or whether or not the poison would procure abortion. On the second count I told them that a noxious drug was one calculated to injure when administered in the way prescribed, and that the pills in question might be noxious things if the evidence for the Crown was accepted, although it might appear that abortion could only be procured indirectly by the pills causing excessive purging or vomiting. This much of my charge was challenged by counsel for the prisoner, and I was requested to state a case. I adhered to the direction and refused to state a case, considering that the decision of the Full Court in *R. v. Drake (a)* governed the matter. I am inclined to think that during argument I stated that even on the second count I was of opinion that a thing would be a 'noxious thing' within the Act, although it could not procure a miscarriage, provided that it might prove injurious in any way when administered, but my recollection is that I did not so direct the jury, and such a direction on the evidence would have been unnecessary. The question for the consideration and determination of the Judges of the Supreme Court is whether my direction as above was erroneous in point of law.

"J. H. HOOD, J."

As the points raised questioned the validity of the decision of the Full Court in *Reg. v. Drake (a)*, the Full Court was specially constituted to hear the case.

J. T. T. Smith to show cause—The case of *Reg. v. Drake* was rightly decided, and has always been acted upon; it was based upon the judgment in *Reg. v. Hillman (b)*, where the Criminal Court of Appeal distinctly decided that all that was

(a) [1887] 13 V.L.R. 498.

(b) [1863] 9 Cox 386.

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necessary to establish a person's guilt under sec. 59 of 24 and 25 Vict., c. 100, was to prove the intention of the person supplying the drug or noxious thing. The question is, what was the intention of the prisoner? He knows what he is supplying, and the purpose for which he is supplying the drug. *Reg. v. Hillman* was followed by *Reg. v. Titley (c)*.

Counsel referred to the following cases:—*Reg. v. Collins (d)*; *Reg. v. Ring (e)*.

Duffy to move the order absolute—Sec. 55 of the *Crimes Act* 1890, which deals with attempts to procure abortion, provides that in order to constitute the offence there must be an administering of a noxious thing or using an instrument with the intent in the mind of the person so administering or using to procure abortion. It must be administering a drug to a specific woman under that section, and there must be an intention, either in the person supplying the drug or in the person to whom it is supplied, to procure a miscarriage. Sec. 56 (*f*) is auxiliary to sec. 55 and the same construction should be applied. "Knowing," in sec. 56, means believing in the existence of something which does in fact exist; you cannot "know" of a thing unless it exists. The words "miscarriage of any woman whether she be with child or not" point specifically to the necessity of there being a woman in existence upon whom the operation is to take effect. The object of the Legislature was to guard against attempts to procure a miscarriage. If a man knows of the existence of the woman, and hands over the drug with the intention that it should be used for the purpose specified, then the crime is complete. In this case there was no intention in anyone. The defendant knew it would not procure abortion, and the detective, of course, never intended that it should be used at all, so that this case is not even covered by the decision in *Reg. v. Hillman*, where it was held that the intention must be in some

(c) [1880] 14 Cox 502.

(d) [1864] 9 Cox 497.

(e) [1892] 17 Cox 491.

(f) "Sec. 56. Whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument

or thing whatsoever knowing that the same is intended to be unlawfully used or employed with the intent to procure the miscarriage of any woman whether she be or be not with child shall be guilty of a misdemeanor. . . ."

person, though it would be sufficient if the defendant himself had such intention. The cases of *Reg. v. Hillman* and *Reg. v. Tilley* were wrongly decided, and if they are wrong of course the decision in *Reg. v. Drake*, which is based on those cases, must fall too.

Counsel referred to *Russell on Crimes* (6th ed.), vol. iii., p. 221; *Archbold, Criminal Practice* (20th ed.), 820.

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Cur. adv. vult.

MADDEN, C.J., read the following judgment:—The prisoner was charged under the provisions of sec. 56 of the *Crimes Act* 1890. The prisoner supplied what the jury found, and what may be assumed for the purpose of my judgment to be, a “noxious thing” within the meaning of the section to Sergeant McManamny, who, for the purpose of detecting an illicit trade which he suspected the prisoner was carrying on, pretended that he required the drug supplied to procure the abortion of a woman. It was admitted by Sergeant McManamny that, in fact, no one did intend to use the drug, and that there was no woman in respect of whom it had ever been intended to use it. My brother Hood directed the jury that if they thought that the prisoner *believed* when he supplied the drug to McManamny that it was intended to be used to procure the miscarriage of a woman, it was unimportant that it was not in fact intended to be so used, or that there was no particular woman in respect of whom the prisoner believed it was to be used. His Honor so directed the jury, following *Reg. v. Drake (g)*, a judgment of the Full Court, which is to the like effect as his direction. The jury convicted the prisoner. The question now is whether this direction was correct, and that involves the consideration of the case of *Reg. v. Drake*.

The sec. 56 runs thus:—“Whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument or thing whatsoever knowing that the same is intended to be unlawfully used or employed with intent to pro-

(g) 13 V. L. R. 498.

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cure the miscarriage of any woman whether she be or be not with child shall be guilty of a misdemeanor." The first matter to be observed is that if the effect of the section is that a person is to be guilty who merely supplies "an instrument or noxious thing" to another in the false belief that there is a woman to be affected by it, and that there is an existing intention in the person supplied to use it on such woman, then the Legislature must be taken to have intended to punish the mere abstract disposition to commit an offence, though there has been no person specifically affected, or who could be affected by it. No such condition of things is known to the common law, or so far as I know is to be found elsewhere in the statute law ; and although in certain statutes an offence is made complete where it is sought to prohibit intentional injury to property if a general evil intention is shown, though none be capable of proof against the owner of the property (see, *e.g.*, sec. 224 of the *Crimes Act* 1890), still the Legislature has been careful to make its intention plain and express even in these cases. Before, therefore, concluding that the Legislature meant in the section now under consideration to punish a mere evil disposition, though no one was, or might be, affected by it, we have to see plain enactment of a proposition so abnormal to the spirit of our law.

The prisoner then must (a) have supplied a noxious thing, (b) knowing that it was intended to be used, (c) with intent to procure the miscarriage of any woman, (d) whether she was or was not pregnant. (a) is assumed in the present case. As to (b), I must say for myself that it would require a very impressive context to make me believe that the Legislature so misused language as to make "knowing" stand for "believing," as it is said to have done by *Reg. v. Drake*. These words not only convey different meanings, but are antithetic to one another. In one sense they mark the accurate dialectic distinction between two conditions of mind ; in another they are a contradiction in terms ; but in no case do they mean the same thing either accurately or colloquially. I therefore think that so much of the judgment in *Reg. v. Drake* as depends on reading "knowing" as "believing" is wrong, both because of the impossible (as it seems to me) interchange of these words, and because there is nothing in the

context which demands such a linguistic distortion to give it a reasonable interpretation.

The Full Court determined, in the case of *Reg. v. Drake*, to so read it, following the case of *Reg. v. Hillman (h)*. That case held the section under discussion to mean that the person charged should have supplied the noxious thing, knowing that *he himself* intended it to be used with intent to procure abortion. With great respect, this seems to me to be but a play on words, and not an exposition of their difficult meaning. How could any man *not* know that he intended the noxious thing to be used if he did so intend it, unless he was insane and intended a thing without being conscious of it. Whatever the Legislature meant by these words, I feel confident it did not mean to embarrass the very simple proposition that the supplier intended that the noxious thing should be used to procure abortion, with the eccentric redundancy that he should *know* he so intended. The case of *Reg. v. Hillman* is the decision of a Court of very high authority; but in criminal cases, at all events, I think that unless he is concluded as a matter of law by the authority of another Court, a Judge ought not to follow a decision which he feels convinced is erroneous, and as *Reg. v. Hillman* is not an authority concluding this Court, and as I cannot think it a correct decision, I am of opinion that this Court should not follow it. In my opinion, the words "intended to be used" must apply to the person supplied, and not to the supplier.

As to (d), in *Reg. v. Drake* the Full Court also thought that the sec. 56 meant that the real existence of a woman intended to be treated was not essential to the completion of the offence. According to the section, there must be an intention to use the noxious thing with the intent to procure the miscarriage of any woman, "whether she be or be not pregnant." How could there be an intention to use it on a woman known not to exist. How could there be an intent to procure the miscarriage of a woman known not to exist. Why should the Legislature be at pains to insist that the pregnancy or non-pregnancy of the woman was not to defeat justice if it meant that the existence

(A) 9 Cox C.C. 386.

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of any woman was unnecessary. All that would have been necessary to provide, if the Legislature considered that the offence should be complete, woman or no woman, would be to say that "whosoever shall supply any instrument or noxious thing with intent, etc., believing that the same is to be used to procure the miscarriage of any woman shall be guilty, etc." The section, in my opinion, is meant to operate to meet two evils, viz., the procurement of abortion of pregnant women, and the injurious interference with the health of women not pregnant but afraid that they may be so. With this view the section penalizes the supply of any instrument or noxious thing by any person who knows that it is intended to be used to procure the miscarriage of a certain woman who is pregnant; or with intent to procure the miscarriage of a certain non-pregnant woman in the erroneous belief that she is pregnant. Read as conveying this meaning, none of the language is strained; every part of it has a reasonable meaning, and the whole is in consonance with the spirit of English law, which aims to punish actual offences only, but not the mere disposition to commit them.

The only difficulty about this view is that it may be said, how can a person who supplies the noxious thing *know* that it is intended by another to be used with intent to procure, etc.? But if a certain woman is indicated to him by herself or by some other person desiring her treatment as for abortion, in that case there is a present existing intention to use the instrument or noxious thing unlawfully in the person seeking to be supplied, and if the prisoner supplies it, being informed of that existing real intention, he knows of what *can* be known, because it exists, and he may be guilty though the person supplied afterwards changes his mind and does not use it. In other words, one cannot know what does not exist, one can know what does exist, and if the intention to use the thing unlawfully be shown, the jury can decide if the prisoner knew of it when he supplied the thing. Courts have often to determine what was the intention or disposition of mind of a man or woman, and, provided there exist a man or woman to think, the Court can ascertain sufficiently to satisfy human tribunals what

was the intention of such man or woman, though that be a fact almost exclusively known to the person "intending" himself or herself. In *Edginton v. Fitzmaurice*, (i) Bowen, L.J., puts it that the state of a man's mind is as much a question of fact as the state of his digestion. Either is pretty much his own secret, but each, being a fact, may be detected by capable inquiry. Whatever difficulty there may be in thus arriving at a knowledge of what another really "intends," it at least is possible; while the absurdity of asking a tribunal to be satisfied that a prisoner "knew," as a thing intended to be done, what admittedly no one ever did intend, has only to be stated to be manifest.

Reg. v. Titley (k) was relied on to sustain the view taken by the Court in *Reg. v. Drake* on this point, but, so far as I can find, neither that nor any other case warrants it. In *Reg. v. Titley* there *was* an existing woman presented to the prisoner as the person to be treated. One Martha Diffey called on him and said her daughter was in trouble and asked him to help the daughter. Her doing so was part of a plot to trap the prisoner. She had two daughters, but neither was in need of an abortionist's offices. The prisoner was wary, and demanded to see the girl. Afterwards a constable wrote purporting to be the author of the girl's trouble, and asked for prisoner's assistance for her, and ultimately he obtained from the prisoner a drug "noxious," within the statute, for the purpose of being administered to the girl as he alleged. He then arrested the prisoner. The indictment charged—(1) the supply of the noxious thing knowing it was intended to be used with intent to procure the miscarriage of a *certain* woman to the jurors unknown; and (2) of the daughter of Martha Diffey. Stephen, J., followed *Reg. v. Hillman* on the point of intent (of which I have already given my opinion), but told the jury "it was immaterial whether *there was a woman in a state fit to be the subject of an operation or not*, but if the prisoner intended that the drug should be applied for the purpose of procuring the miscarriage of *Martha Diffey's daughter*, they should convict him. This charge plainly contemplates the necessity of an existing woman, though it points out the

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(i) [1885] 29 Ch. D. 483.

(k) 14 Cox C.C. 502.

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unimportance of her being pregnant. The Court here in *Reg. v. Drake* seems to have thought that if a pretended intention to use the noxious thing would suffice to found the charge, why might not a pretended non-existing woman suffice. This, however, seems to me to found a fallacy on a fallacy, because, as I have endeavoured to point out, the interpretation of the words "intended to be used or employed to procure the miscarriage of any woman," following the word "knowing," requires that the intention must be a real intention, and if so, then the analogy by which *Reg. v. Drake* disposes of the necessity for the existing woman disappears, and nothing remains but the words of the statute, which demand, I think, an existing woman, and no authority decides otherwise. In *Reg. v. Hillman*, the only question reserved by the case was as to the meaning of the words "knowing that the same was intended to be used," etc. There was an existing woman presented to the prisoner in that case, though she only pretended an intention to use the drug, but the Court cautiously says expressly, "We confine our judgment to the question submitted to us," and therefore that case not only is not an authority for the proposition that an existing woman is not essential, but it seems to guard itself from any such supposition. Hence *Reg. v. Drake* is not founded, as I think, on any other authority as to this point of a "non-existing woman;" and with all the respect which is demanded by the decision of such a Court as decided it, I find myself compelled to believe it erroneous as to this point also.

Of course as to the other point, the meaning of the words "knowing that the same is intended to be used with intent to procure," etc., my decision is not, as I have said, in accord with either *Reg. v. Hillman* or *Reg. v. Titley*, as *Reg. v. Drake* is. All these decisions in effect decide for one reason or another that the supplier of the drug could lawfully be held to "know" that the drug supplied was intended to be used to procure a miscarriage, when all the evidence admittedly established that no such intention was ever entertained. The view in *Reg. v. Hillman* rests on what seems to me a demonstrable misreading of English words; that in *Reg. v. Titley* on a psychological impossibility, so far as it differs at all from *Reg. v. Hillman*, and *Reg. v. Drake*,

following these, is necessarily erroneous also, as I am forced to believe.

I therefore think that *Reg. v. Drake* should be overruled, and that the rule *nisi* should be made absolute; but, as my brother Hood has already stated the necessary case, in order to save time, and as it has been agreed that we should deal with that case on the return of the rule *nisi*, the conviction should, in my opinion, be quashed. As my brothers Holroyd and Hodges have arrived at a like conclusion, while my brothers Williams, A'Beckett, and Hood take the opposite view, the judgment of the Court follows my decision, and the conviction is accordingly quashed.

WILLIAMS, J. The question we have to consider is whether the case of *Reg. v. Hillman* was rightly decided. That case puts a certain interpretation upon the section we are considering, and if it be good law decides the present case. The judgment in *Reg. v. Drake*, in this Court, was founded upon *Reg. v. Hillman* and *Reg. v. Titley*. Now, *Reg. v. Hillman* is a case of very high authority; it was decided by the Criminal Court of Appeal in England; the judgment was delivered by Erle, C.J., for the Court, consisting of himself, Wightman and Williams, JJ., Martin, B., and Keating, J. In the later case of *Reg. v. Titley*, Stephen, J., who is no mean authority upon difficult questions of criminal law, not only followed *Reg. v. Hillman*, but also stated his own opinion, and that opinion concurred with the ground upon which the Court of Criminal Appeal decided *Reg. v. Hillman*. There is no reference in the judgment in *Reg. v. Hillman* to an existing woman, or to the words "whether the woman be with child or not;" that part of the section is ignored altogether. The judgment is expressly stated to be based on the following words in the section:—"Whosoever shall unlawfully supply a noxious thing, knowing that the same is intended to be unlawfully used or employed with intent to procure miscarriage." The way in which the Court of Criminal Appeal apply the words of that section to the case they are considering is this: They say it is absolutely immaterial whether the person to whom the drug is supplied intends to use it for the purpose of procuring a miscarriage or

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not. But they say that the ground on which the conviction should be upheld is that the person who supplied the drug knew that he intended that the drug should be used for that purpose. It must be presumed, they said, that he knew his own intention, and on that ground they decided that the conviction should be upheld. They say, therefore, that to support a conviction under that section it is sufficient if the person supplying the drug intend that it should be so used, implying as clearly as possible that it is absolutely immaterial whether anyone else had that intention or not. If that is so, it is idle to endeavour to distinguish the present case from *Reg. v. Hillman* on the question of an existing woman, or as to her being pregnant or not. There is not one word said in the judgment from first to last which discloses that the Court paid the slightest attention to those words. (His Honor read the judgment of Erle, C.J.) They say emphatically that the intention of any person other than the prisoner is absolutely immaterial. Now, as I have said, *Reg. v. Drake* was decided upon that case, and if *Reg. v. Hillman* is right, then it is incontrovertible that *Reg. v. Drake* is right also.

The question then is whether *Reg. v. Hillman* is right or wrong. I approach that consideration with great diffidence and hesitation. But if it were not for that case I should, after much consideration, be inclined to say that this conviction ought not to be upheld, because, reading that section apart from authority, I should say that the proper construction of those words—"knowing that the same is intended to be unlawfully used or employed with the intent to procure the miscarriage of any woman whether she be or be not with child"—necessarily implies the existence of an intention in the mind of the person to whom the drug is supplied to procure the miscarriage of a woman. If the person to whom the drug is supplied intends to procure the miscarriage of a woman, and communicates that fact to the person who sells the drug, and that person believes what he is told, he then knows it within the meaning of the section. But I do not think he can be said to know what is not a fact. If the person to whom the drug is supplied has laid a trap, and has no such intention,

then I do not see how, regarding the words of the section, the person supplying the drug can be said to know that he has that intention.

In the ordinary case of receiving goods knowing them to be stolen, the "knowing them to be stolen" implies that the goods are stolen. Unless they are stolen the person who receives the things cannot have any knowledge of the fact. Suppose an Act said that anyone who supplies a gun to another person, knowing that the said person intends to take the life of a certain person with it, shall be guilty of a felony. Suppose the person to whom the gun is supplied has no such intention at all, but merely wants to go rabbit-shooting. He knows that the person whom he asks for the gun has a grudge against C. He says, "Lend me this gun; I know you wish to take C.'s life. I will go and shoot C.," his real intention being to shoot rabbits. I do not think it could possibly be held, under the ordinary construction of the words of the supposed section, that the person supplying the gun was guilty, because he has to know that the person supplied with the gun intends to shoot C., whereas he has no such intention. Therefore I think, for the reasons I have stated, that the case of *Reg. v. Hillman* is wrongly decided, though I say so with great deference.

Now, if the matter rested there I should be of opinion that the conviction ought to be quashed. But the Privy Council, in the case of *Trimble v. Hill* (1), has laid down this principle for the guidance, amongst other colonial courts, of our own Court, and at p. 344 their lordships say:—"Their lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts of England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature the colonial Courts should also govern themselves by it. The Judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of *Hogan v.*

(1) [1879] 5 App. Cas. 342.

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Curtis, but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle v. Higge*, as the English Court which decided *Batty v. Marriott* would have felt bound to do if a similar case had again come before it." Now, the Privy Council there lay down in the clearest and most emphatic manner the course which ought to be adopted in the circumstances alluded to. It will be noticed that the Privy Council did not say we are bound. But they say twice over that we should govern ourselves by the decision of an English Court of Appeal, and that we might well yield to the high authority of the Court of Appeal. Now I must say, therefore, I feel I ought to follow the very emphatic advice given to this Court by the Privy Council, and follow the decision in *Reg. v. Hillman*. For that reason, I think that this conviction should not be quashed, but should stand upon the authority of the two cases to which I have referred.

HOLROYD, J., read the following judgment:—The 56th section of the *Crimes Act* 1890 provides that whoever shall unlawfully supply or procure any poison or other noxious thing knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor. The words "whether she be or be not with child" presuppose that the guilty intention must exist with reference to some woman, concerning whom it can be ascertained whether she is pregnant or not. How it can be ascertained whether a woman who never existed is pregnant or not passes apprehension; yet the words must have been placed where they are with some object. Now, in interpreting sec. 56, we cannot properly disregard sec. 55, with which it is closely connected; and it is quite certain that in sec. 55 the same words are used with respect to an existing woman, namely, the woman to whom the poison or other noxious thing is administered, or who is caused to take it. These two sections occur in subdivision (9) of Division I. of Part I. of the Act, which division is headed "Offences against the person;" and before and ever since Black-

stone's time this expression has been understood to mean crimes injurious to the persons of individuals. Following the course of legislation, we can see at once why, if the question of the woman's pregnancy was to be excluded from consideration, an enactment to that effect was required. The Act 43 Geo. III., c. 58, which created several new felonies, and amongst others certain attempts to procure abortion, drew a distinction between women quick with child, and women not quick, or not proved to have been quick, at the time when the offence was committed; assigning the penalty of death where the woman was quick, and a lesser though severe punishment where she was not or was not proved to have been quick (secs. 1 and 2). This distinction, it was held, showed pregnancy to be a necessary ingredient in the offence, whether the woman were quick with child or not: *R. v. Scudder* (m). The statute 43 Geo. III., c. 58, was repealed by 9 Geo. IV., c. 31, which, however, by sec. 13, substantially re-enacted the provisions of the former Act so far as they related to attempts to procure abortion, and retained the same distinction between quick and not quick. But in the statute 24 and 25 Vict., c. 100, the 58th and 59th sections of which statute secs. 55 and 56 of our *Crimes Act* are copies, excepting as to the penalties imposed, the distinction I have adverted to is not continued; and pregnancy of the woman is rendered unnecessary as an ingredient, not only of the offence of attempting to procure abortion (sec. 55), but also of the new offence of supplying drugs to be used for that purpose (sec. 56). In my opinion we should be no more justified in cutting the words "whether she be or be not with child" out of sec. 56 than out of sec. 55; and while they remain the inference must be drawn from them equally in the one section as in the other, that if they had not been inserted the pregnancy of the woman would have been a necessary ingredient in the offences described. In *Regina v. Hillman* (n), it was held not to be necessary, in order to constitute the offence described in sec. 56, that the intention to employ the poison or other noxious thing should exist in the mind of any other

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(m) 1 Moody 216; [1828] 3 C. and P. 605.

(n) 9 Cox. C.C. 386; Leigh & Cave C.C.R. 343.

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person than the person supplying it. But it was not in that case decided, or even suggested, as I read it, that the intention was sufficient if entertained towards some imaginary woman. It only decides that the misdemeanor specified in sec. 56 is the supplying the means of committing the felony specified in sec. 55, either intending oneself, or knowing that it is intended by somebody else that it should be so employed. The verb "know" has several significations. I think that in sec. 56 "knowing" the intention means "aware of" or "cognizant of" the intention—that is, having been informed of it in any way, by word of mouth or otherwise. This use of the verb "know" is frequent in common parlance. It implies the truth or reality of the thing known, but not the belief of the person who knows, although such knowledge might be strong evidence of his belief. For the reasons given I think that the decision in *Reg. v. Drake* was erroneous, and that my brother's, Hood's, direction to the jury, founded upon it, was also wrong.

The judgment of HODGES, J., was read by MADDEN, C.J. Hyland was being prosecuted under sec. 56 of the *Crimes Act* 1890. The learned Judge told the jury (*inter alia*) "that the offence might be committed although there was no existing woman in question." The correctness of that direction is challenged. The section so far as material provides that whosoever shall unlawfully supply any noxious thing, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor.

Now, this language, in my opinion, shows that the Legislature were dealing with an intention to use the noxious thing in connection with some existing woman. The words are—"With intent to procure the miscarriage of any woman, whether she be or be not with child."

The "she" must, in my opinion, refer to an existing woman, to whom the noxious thing is to be given. The "she" cannot, in my opinion, refer to a non-existing person.

Further, the construction which the Crown seeks to put on the section gives no sufficient effect to the words "whether

she be or be not with child," as it could not matter whether she was with child if it did not matter whether she did or did not exist.

I cannot say that this opinion is expressed with any great confidence, seeing that some of my colleagues take a different view, and that it is in conflict with the decision of *Reg. v. Drake (o)*. It is with great reluctance that I concur in overruling that decision. But this is different from a question of mercantile law, where merchants and traders might for years have been acting on the decision, and the rights of parties settled by it. In this case no person is injuriously affected by the overruling of that case, and as in my opinion that case was wrongly decided, I am bound, though unwilling, to express that opinion.

A'BECKETT, J., read the following judgment:—The English authorities upon which *Reg. v. Drake* was decided by this Court fully support the judgment in that case, and unless we decline to recognize these English authorities as still binding, they afford a complete answer to the objection that the accused cannot be rightly convicted because there was no existing woman as against whom his criminal intention was directed. They expressly decide that a man can be convicted of the offence when no one but himself intends the noxious thing to be used to procure miscarriage, and when his belief that others intend so to use it is based upon a false statement. In *Reg. v. Hillman* the woman who applied for the mixture pretended she was going to use it, when she had no such intention. In *Reg. v. Titley* a mother pretended that it was required for her daughter, and though, as matter of fact, she had two daughters, she did not require it for either of them, and the daughter as to whom she made the pretence was in no way named or identified, so that the intention of the accused was not directed to any ascertained person. I can see no sound distinction between supplying poison for the use of a woman who has no intention of using it and supplying it for the use of an imaginary woman. *Quoad* the possibility of harm to anyone

(c) 13 V.L.R. 498.

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from the act done in pursuance of the evil intent, the woman is as non-existent in the one case as in the other. If a person can be rightly convicted who supplies upon a false statement, and when the procuring of miscarriage is contemplated by no one but himself, it is immaterial whether that false statement mentions a living woman or a fictitious woman.

Though I feel satisfied that the English cases support *Reg. v. Drake*, when I come to reconsider the reasoning upon which the English cases proceeded, I feel great difficulty in following it. The section under consideration is apparently aimed at a person who supplies a noxious thing to another to enable that other to commit an offence, and when it says "knowing that the same is intended to be unlawfully used" it manifestly refers to the intention of that other person. Can the accused be said to know that the same is intended to be unlawfully used when it is not, in fact, intended to be so used, and he merely believes that it is on the strength of a false statement. Admitting that the knowledge which the section requires need not be more than belief, must not that belief be of a fact, not of a fiction. The way in which the difficulty was met in *Reg. v. Hillman* was not by saying that his belief that another intended to use the drug, though, in fact, she did not intend, was sufficient, but by saying that the knowledge required by the section was supplied by the prisoner's knowledge of his own intention; he knew his own intention that the drug should be unlawfully administered, and that was enough. It seems to me that this interpretation of the section does violence to its language. It cannot be disputed that the words "knowing that the same is intended" are primarily applicable to the person to whom the accused supplies the noxious thing. To read them as applicable also to the accused himself, and to say that they will cover the case of his supplying the noxious thing knowing that he intended the same to be unlawfully used, seems to be a straining of language unwarranted by the frame of the section. For these reasons, if the case of *Reg. v. Hillman* had no binding authority, I should agree with the members of the Court who think that *Reg. v. Drake* should be overruled. But considering the weight which this Court should attach to the decision of the Court of Criminal Appeal in

England to the fact that that decision was prior to the adoption by our Legislature of the section thereby construed, and to the further fact that our Court has already followed the English decision which we are now virtually asked to overrule, I think that the construction adopted in the English Court, and followed in our own, should not be now set aside because we are not now satisfied with the ratiocination of the English authority.

HOOD, J., read the following judgment:—The question for our determination now is whether or not the decision in *Reg. v. Drake* is correct, and in my opinion it is.

It was contended for the prisoner that either there must be an existing woman for whom the poison or noxious thing is intended or there must be in someone an intention to procure abortion. This argument was mainly based upon the use in the section of the word "knowing." It was urged that a person cannot know a thing if that thing does not actually exist at the time, so that unless someone really had an intention, the prisoner could not possibly know of that intention, and therefore could not be convicted. I do not think that the Legislature used the word with such a limited meaning. Perhaps strictly speaking "knowing" means having a perception of a thing which exists, and is not equivalent to belief. But colloquially it is frequently used in a wider sense, and the boundary between knowledge and belief is not always distinct or well defined. The section speaks of knowing an intention. So far as that relates to the operation of another person's mind, which would be the common case, no man ever does know another's intention so as to be positively certain that such intention really exists. A man says that he has a particular intention relating to a future act. His hearer at that moment can only believe, or disbelieve, or doubt. If the hearer thinks that what he is told is true, that is the utmost limit to which his mind can then attain, and in ordinary talk he would be said to know what the other intended to do. The condition of mind of the man who supplies a drug within this section, at the time when he supplies it, can only be belief, and that condition cannot be altered by the subsequent discovery as to the truth or untruth of what was told him. This belief is,

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according to the contention for the prisoner, transformed or not, into absolute knowledge according to what is subsequently ascertained as to another person's intentions. It remains belief until those intentions are determined, and then it may be said to have been knowledge at a previous period when facts are established of which the prisoner was wholly unaware. If the jury find that a real intention existed, then the prisoner knew, but if they find otherwise than he only believed, his mind being in the same state all throughout. So that the prisoner's guilt or innocence would not depend upon his own acts or intentions but upon these *plus* what a jury might determine to have been in the mind of another. If, therefore, the person who obtained the drug intended, at the time, to use it, but changed his mind and never did so, still the prisoner would be guilty. Yet if that person did not at first intend, but subsequently used the drug, the prisoner would be innocent. And in each case the prisoner's belief, intention, and acts would be the same. So a man who supplied a noxious drug, believing that it would be used in procuring a miscarriage, there being a real intention in someone to use it, would be punished, although it appeared that the miscarriage was an impossibility owing to non-pregnancy of the woman, yet the same man supplying the same drug, under the same belief, would go free when it appeared that the impossibility of carrying out his design arose from the non-existence of any woman in question, because there was no actual intention. His liability, therefore, in the first case and his irresponsibility in the second would not arise from anything within himself, but solely through the existence or non-existence in someone else's mind of a particular intention. I cannot think that Parliament meant such a result, and, in my opinion, it is sufficient to constitute the offence if it be proved that the prisoner unlawfully supplied the drug, believing at the time that it was intended for the improper purpose. This offence is not analogous to that cited of receiving stolen goods knowing them to have been stolen. On such a charge an accused would be acquitted if it appeared that the goods had not been stolen, although when he received them he may have believed that they were. In that case the word "knowing" has the

narrow meaning contended for here. But the very foundation of that offence is the existing theft. If that disappears the whole disappears. In the present case, however, it seems to me that the essence of this crime is the unlawful supply with the object of assisting in an illegal purpose, and it is not necessary to prove the intention to commit a crime existing in another person in order to establish the guilt of the accused.

If the case rested upon the use of the word "knowing," I should have had no difficulty, but I have felt great doubt arising from the subsequent words "whether she be or be not with child." From these it might appear that the word "knowing" is to be taken in its strictest sense, and that the section is confined to cases where there is a real intention and an existing woman. This contention receives support from the arguments based on sec. 55 of the *Crimes Act*. Under that section there must be an existing woman and an intent, because there the offence consists in the actual administration of the noxious thing to the woman with intent, and it is argued that sec. 56 is but in aid of this section. Yet even under sec. 55 the only matters in question are the acts and intentions of the accused, and his guilt in no way turns upon what may be passing in another's mind. Besides, if sec. 56 is limited to cases within sec. 55 it would seem almost superfluous. The supply of means to carry out a contemplated crime with knowledge would nearly always amount to conspiracy, or would make the supplier liable as principal or accessory if that crime were eventually committed. Again, if the section is limited, and there must be a real woman and a real intention, when must they exist? There need be no real pregnancy, but a supposed state will do. At what time therefore must the woman exist who is believed to be pregnant though not really so? Does the prisoner's guilt or innocence turn upon whether that woman lives or dies? Her living or dying is immaterial in one sense, because the crime is committed although the drug be never administered to her, and although she is in total ignorance of what is contemplated. If therefore she were alive when the drug was supplied this would seem to meet any interpretation of the section. But suppose she were dead at the time of the supply, but was believed to be alive. If a man

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intending to procure abortion in a woman whom he believes to be alive and pregnant, applies to the prisoner for a drug to assist that intention, and the prisoner, informed of the purpose, supplies the drug, would he be acquitted if it appeared that the woman died before the drug was supplied, her death being unknown? If so, his guilt depends not only upon what is passing in another man's mind, but also upon whether the woman lives beyond a certain date, and he would escape simply because his own guilty intentions, were based upon ill-founded beliefs. I consider that such a case would be within the section even in a narrower reading of it than I think correct, for there would still be the intention to procure abortion. The same result, I imagine, would follow if the woman were dead at the time that the intention to procure miscarriage was formed, if there were a belief in her existence. The essentials of the offence, therefore, in this view are—a woman that had once existed, an intention to use a noxious drug on her, a belief that she is alive and pregnant, and a supply of a noxious drug by the accused, he being informed of and believing in the existence of the woman and of the improper intention. I cannot see any reason for saying that the accused should be convicted in such a case where the woman had existed but was dead and acquitted when there never had been any woman. The only distinction can be that in one case there is a real intention to use the drug, and in the other there is none. That makes, as I have pointed out, the guilt or innocence of the accused depend upon the unascertained, and at the time of the occurrence the unascertainable, state of another man's mind. Moreover, in this view the existence of the woman is only necessary in order that there may be a real intention in the receiver to administer the drug to her. How, then, would it be if the real intention existed but the woman did not? Suppose that a man is informed that a woman desires to procure abortion and is bribed to procure the means, there being in reality no such woman. Then that man, believing that there is such a woman, and with the real intention of assisting her in the illegal object, applies to the prisoner, informing him that the woman exists, and that it is intended to procure abortion. The prisoner, believing in what he is told, supplies a

noxious drug to be used in the way proposed. In that case there never would have been any woman, but there would be a real intention to use the drug. Would the prisoner be acquitted because the other man was mistaken? It may be said that these are exceptional cases. So they are. But they are possible, and they show the perplexities that may arise from making the person who unlawfully supplies a noxious drug, meaning it to be used for the illegal end, guilty if he has been told the truth, but innocent if not. I think that these difficulties are all avoided, and a beneficial meaning given to the section by holding that "knowing" merely means "believing," and that a man who supplies the forbidden thing should be dealt with according to his own thoughts and deeds. The words "whether she be or be not with child" form no part of the definition of the offence. They can only be used as a guide to the proper interpretation of the section. They lose much of their force when once it appears that they may apply to the case of a woman who, though she once existed, was dead when the drug was supplied, and they seem to me to have been adopted incautiously from the original of the preceding section, where they are necessary, that section having been in force for some time before the original of sec. 56 was enacted. These words of the section have raised considerable doubt, but, in my opinion, the object of the Legislature was the prevention of the unlawful supply of the means for procuring abortion. That object is best attained by holding that the offence is complete when a man unlawfully supplies a noxious drug under the belief that it is to be used upon a pregnant woman, and this view is supported by *Reg. v. Drake*, a decision which has been acted upon for years unchallenged, either in the Legislature or in the Courts, and which is founded on English decisions of high authority.

It has been said in support of the prisoner's contention that a man cannot be convicted of assisting in a crime that does not exist. Put baldly, this may be so, though everything turns on the statute in question. But a man may be convicted of attempting to steal from an empty pocket. And persons may be convicted of a conspiracy whose object is impossible (*Stephen's*

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Digest, Article 49). So where a woman believing herself to be with child, but not being so, conspired with others to administer drugs to herself, with intent to procure abortion, they were all held guilty of conspiracy to do an act which, if it had been done, would not have been a crime on her part, inasmuch as the section in question only covered the case of a woman being with child: *Reg. v. Whitchurch (p)*. I do not think, however, that we get any aid in this case by reference to any other offence, as this is one created solely by a section of an Act of Parliament, *sui generis*, and the whole question is what does that section mean.

In my opinion, all that is required under this section is the guilty mind and the unlawful supply. The latter is distinctly proved, and is not in question. The former arose when the prisoner determined to aid and assist in a projected abortion. His intention was to become a party to a crime, and he acted in furtherance of that intention. When he did so his offence was complete and he ought not to be acquitted simply because another person is not equally guilty. I think that the conviction should be affirmed.

Solicitor for Crown: *Guinness*, Crown Solicitor.

Solicitor for prisoner: *W. H. Croker*.

W. H. M.

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June 17.

Madden, C.J.

IN RE FORBES AND THE MARINE BOARD OF VICTORIA.

Marine Act 1890 (No. 1,165), ss. 181, 183, 184, 185—Court of Marine Inquiry, investigation by—Constitution of Court—Skilled members, list of—Master of steamship, charge against—Misconduct—Gross act of misconduct—Jurisdiction, consent to—Charges against two persons heard together—Certificate, suspension of—Prohibition.

The Court of Marine Inquiry, in investigating a charge against a certificated master of a steamship, must be constituted by one or more police magistrates and two skilled members, such skilled members to be certificated masters of steamships; where, therefore, in investigating a charge against a certificated master of a steamship the Court included an exempt master or pilot, such Court is wrongly constituted.

The Court of Marine Inquiry, in investigating a charge against a captain of a steamship for misconduct, has no power to order his certificate to be suspended unless it finds him guilty of a gross act of misconduct.

The Marine Board has no jurisdiction to direct the Court of Marine Inquiry

(p) [1890] 24 Q.B.D. 420.

to investigate at one and the same time charges against a certificated master of a steamship and against a pilot, being the persons in charge of the respective vessels that came into collision.

Where such charges are heard together, the consent of the parties that they should be so heard cannot give jurisdiction.

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THIS was order *nisi* calling upon the Marine Board of Victoria, the Court of Marine Inquiry, and J. A. Panton, P.M., president, and W. F. A. H. Russell and George Bevis, Esquires, skilled members of such Court, to show cause why a writ of prohibition should not issue prohibiting them from the enforcement of the suspension of the certificate of competency as a master of William Chalmers Forbes, and from enforcing or in any way acting upon the decision, judgment, or order suspending such certificate, or ordering him to pay the costs of the proceedings made by the said Court of Marine Inquiry; or, alternatively, why a writ of *certiorari* should not issue to bring up to be quashed the said judgment, decision or order, and all proceedings connected therewith, on the grounds:—

1. That there was not any proper order of the Marine Board directing the investigation of any charge against the said William Chalmers Forbes.

2. That the Marine Board had no power to order an investigation into the two distinct charges, or to direct any members of the Court of Marine Inquiry to hold the same.

3. That the Court purporting to have been constituted to hear the said charges was not competent or legally constituted to hear the same or either of them.

4. That there were not two specially skilled members sitting at the hearing, as required by the provision of Division IV. of the *Marine Act* 1890, or the regulations made thereunder, or either of them.

5. That one of the skilled members sitting at the hearing was not competent to deal with a charge against a certificated master of a steamship, either in fact or as appearing from the list referred to in sec. 185 of the said Act.

6. No proper or definite charge was made against the said William Chalmers Forbes enabling the Court of Marine Inquiry to suspend his certificate.

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7. That the said Court did not find the said William Chalmers Forbes guilty of an offence under the *Marine Act* 1890 justifying a suspension of his certificate.

8. That the judgment or finding of the said Court of Marine Inquiry upon the reasons stated in the annex to the said judgment did not justify the said Court in suspending the certificate of the said William Chalmers Forbes.

The charge formulated by the Marine Board against Captain Forbes was as follows :—

“To William Chalmers Forbes, Master of the steamship *Edina*.

“Take notice that a charge of misconduct, in that you did, as master of the steamship *Edina*, carelessly navigate the said steamship on the 27th April 1898, whereby, and as the result of such careless navigation, the said steamship came into collision with and did sink the steamship *Manawatu* in the vicinity of the Gellibrand Lightship on the date aforesaid, has been made against you by the Marine Board of Victoria. . . .”

The order of the Marine Board directing a formal investigation by the Court of Marine Inquiry was as follows :—

“*Re* Collision between the steamships *Edina* and *Manawatu* off Gellibrand Point on the 27th April 1898.

“The Marine Board of Victoria having, at a meeting thereof held at Melbourne this 29th April 1898, in conformity with the 43rd clause of the *Marine Act* 1890, received from the master of the steamship *Edina* and the pilot in charge of the steamship *Manawatu* respectively reports relative to the abovementioned casualty, doth now, in pursuance of the power vested in them by the said Act, direct that a formal investigation be held by the Court of Marine Inquiry into a charge of misconduct hereby preferred against William Chalmers Forbes, the master of the steamship *Edina*, in that he did carelessly,” &c.

The notice sent by the President of the Marine Board to the Police Magistrate and to Captain Russell and Mr. Geo. Bevis was as follows :—

“*Re* Collision steamships *Edina* and *Manawatu*.

“Sir,—I have the honour to inform you that the Board has directed that the Court of Marine Inquiry proceed to hold a

formal investigation into charges preferred against William Chalmers Forbes, the master of the steamship *Edina*, and Charles Bickford Blanchard, who was in pilotage charge of the steamship *Manawatu*, in connection with a collision which occurred between the said steamships in the vicinity of the Gellibrand Lightship on the 27th April 1898. Such investigation is to be held at the Custom House," &c.

In the list of skilled members of the Court of Marine Inquiry prepared under the provisions of sec. 181 of the *Marine Act* 1890, the skilled members were divided into "Masters of Sailing Vessels," "Masters of Steamships," "Engineers," "Pilots and exempt Masters," and persons having "scientific experience." In this list Captain Russell was classified under the heading "Masters of Steamships," and Mr. Bevis under "Pilots and exempt Masters."

The judgment of the Court of Marine Inquiry was as follows (after reciting the charge):—

"The Court having carefully inquired into the circumstances attending the abovementioned charge finds, for the reasons stated in the annex hereto, that the charge of misconduct preferred against the said William Chalmers Forbes has been sustained, and that such misconduct amounts to gross misconduct. The Court therefore suspends his certificate of competency as a master for a period of twelve (12) calendar months from this date, and also orders him to pay to the clerk of the Court of Marine Inquiry the sum of £31 10s. on account of the expenses of this investigation.

Cussen moved the order absolute.

Mitchell showed cause.

MADDEN, C.J. In respect to this matter there are several points of great interest, having regard to the series of cases which have come under the notice of the Court from time to time. There are three objections raised on behalf of Captain Forbes. The first objection is that there was no proper tribunal constituted to deal with this matter. The second was a series of objections, it being first urged that there was no proper calling into

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existence of any Court which came under the Act. It was next urged that the Court purporting to be called into existence was wrongly constituted when it was called together; and the third objection was that, when it was called into existence, there was no proper charge, and no proper finding on fact to warrant the sentence, and, finally, that no such finding could be found. In my opinion, the first and second grounds are sustained.

The intention of the Legislature, when passing this Act, appears pretty clearly to be this, that the Minister or the Marine Board may do one of two things. If they cannot make up their minds and are puzzled as to the true character of the supposed offence, they can hold a general investigation, or, rather, they may direct the Court of Marine Inquiry to hold an investigation, not charging anybody with anything, but, like a coroner's inquest, seeking to get at the bottom of the thing and to get at the facts so as to formulate charges thereafter. But if the known facts appear at the first glance to indicate a charge against some individual or several individuals, then the Board may direct the Court of Marine Inquiry to hold an investigation into a charge of incompetency or misconduct, and the Court shall hold such investigation. Therefore, where the Board has made a charge, and directs the Court of Marine Inquiry to investigate a charge of incompetency or misconduct as here, it is to be assumed that the Board or the Minister was possessed of sufficient facts to warrant the Board in charging Captain Forbes in this case, and also Pilot Blanchard. The subject-matter out of which these charges arose was a collision between two ships, one of which was under Captain Forbes and the other under Pilot Blanchard. What was then done was that the Court of Marine Inquiry was directed by the Board to investigate a charge of misconduct against both of these officers. That properly meant, and the Court interpreted it to mean, that it had at one and the same time to try these two officers on a charge of misconduct arising out of the collision and the management of the ships. The first objection is that no such charge can be ordered by the Board according to the common principle known to the law that a man charged with an offence or quasi-offence such as will subject him to punishment, or loss of property

or loss of status, shall not be embarrassed in his defence by the introduction of anything foreign to the matter charged against him, and which was chargeable against somebody else. This is a principle of law and fair play, which jurisprudence has recognized very plainly ; and obviously it is very desirable, because, even in the hands of experts accustomed to deal with and weigh evidence in a scientific manner, where two persons are charged together and evidence is admitted relating to the issue against one, it is quite difficult, if not impossible, to be free from the influence of the evidence which has been admitted against A. as against B., even though in truth it is not evidence against B. at all. Therefore, when Captain Forbes was put up charged side by side with Pilot Blanchard, it is conceivable that evidence which was evidence against Pilot Blanchard but not evidence against Captain Forbes might influence the minds of the Court against Captain Forbes. Practically one sees the same difficulty in this case as in the cases ordinarily coming before the Criminal Court ; as, for instance, two or three persons break into a house to steal, and at the same time a number of others break in with intent to commit a riot : it would not be lawful to try them together for separate offences at the same time, using the same evidence, which might be applicable to the one set of offenders but which would affect the persons charged with another and separate offence. The acts would have been done together, but the offences would be quite different, and, although they were engaged in what appeared to be a common act, it would be impossible to try such offences at the same time in the Criminal Court. Each of the men in the present case was on a different ship, and the misconduct of Pilot Blanchard might have depended upon altogether different circumstances to that of Captain Forbes. The two ships came into collision, but the cause might be the misconduct of the one or of the other, but the misconduct of the one might not relate in any way to the misconduct of the other. If they were put up for trial at the same time it would be difficult to avoid visiting on Captain Forbes that which might have been merely the misconduct of Pilot Blanchard, and there would be difficulties of a cogent character if such things were done, viz., trying two different persons on the one trial. If the

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Act provided that this might be done that would be enough, but where all that the Act has provided is in general terms that the Court of Marine Inquiry is to hold its inquiry on a charge of misconduct, that must be read according to ordinary principles of law.

It has been pointed out with much force that this Court of Marine Inquiry is a very peculiar court ; it has to be constituted according to the rank of the person charged. By rule 9 of "The Court of Marine Inquiry Rules 1890," if a certificated master of a steamship is charged, one at least of the members of the Court of Marine Inquiry shall be either a master mariner possessing a certificate of competency as such, who has served five years as master in the merchant service in the command of a ship since the granting of his certificate, during two years of which service he must have been in command of a steamship, or an officer who has served not less than five years in any rank not lower than that of lieutenant or navigating lieutenant in Her Majesty's naval forces, or in the naval forces of the colony ; by rule 10, if an engineer is charged, one at least of the members of the Court must be either an engineer who has served five years as engineer in the merchant service and who at the time of his selection by the Board as eligible for appointment holds a first-class certificate of competency, or an officer who has served not less than five years as an engineer in Her Majesty's naval forces or in the naval forces in this colony, and has attained the rank of first-class engineer ; and by rule 11, if a pilot or an exempt master is charged, one at least of the members of the Court shall be a person who is either a Port Phillip pilot or a person who has voluntarily retired from that position, or a master holding a certificate as exempt master. It therefore appears that, according as he is a master or an engineer or a pilot, a different tribunal is to try him. If the argument which has been addressed to me were sustained, and the contention were to be acceded to, it might happen that you might have three persons charged together, and it might then be an impossibility to construct the Court in the way the Act requires. This is a ground for presuming that the Act never intended a different course to be pursued than in any other criminal or quasi-criminal

court. I think the Board was in error in directing the trial of these two officers together; but the Court had no other warrant to hold any other court, and, as that was the only warrant, they could only hold that court, and its constitution was erroneous.

Then it is said that Captain Forbes cannot take advantage of any irregularity because he consented to the course adopted. In my opinion he could not consent to it, nor could anyone on his behalf consent to it, because it is a principle of our law that the court which the country constitutes shall be so constituted, and none other. The administration of justice shall be according to set and well-established principles and ceremonies, and these cannot be departed from even in exceptional cases, as is shown in *Regina v. Bertrand* (a). That this is so is established by the case of *Rattray v. Roach* (b). That was a prosecution under the *Licensing Act*, and the information charged the defendant with an offence under that Act. He came into Court and said—"I admit everything; all the facts are correct; but I hold a brewer's license. I consent to be convicted in order to appeal." Both parties consented, there was a conviction, and the defendant took out an order *nisi*, and the Full Court held that the proceedings were wrong, because the parties under the circumstances could not consent to anything of the kind, and they not only quashed the conviction, but refused to allow the informant to go on. That case shows that an Act of this kind cannot be overridden by the consent of anyone. Therefore, in my opinion, grounds 1 and 2 are made out.

Then, as to objections 3, 4, and 5, I am also of opinion that they are sustained. These run into one another; the same proposition is restated for greater caution. They come to this, that, even assuming that Captain Forbes and Pilot Blanchard were properly tried together, it is said that the Court was wrongly constituted as to Captain Forbes, for that, under sec. 184 of the *Marine Act* 1890, he, being a master of a ship, and charged as a master, was entitled to be tried by a court constituted by a police magistrate and two skilled members who are nautical members within the meaning of that section. I think that that is so. The section directs that the Court "shall

(a) [1867] L.R. 1 P.C. 520.

(b) [1890] 16 V.L.R. 165.

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be constituted by one or more police magistrates and two skilled members such members to be nautical or engineering or other specially skilled members according as the investigation is into a charge against a master or mate or engineer or into some matter requiring other special skill or experience respectively." I therefore think that a charge against a master must be tried by those who are nautical.

As to who are nautical must be considered thus: sec. 181 provides that the Court "shall consist of the police magistrates of Victoria and the skilled members appointed by the Governor in Council as in this Act directed. The Governor in Council may appoint any number of persons not exceeding ten in all who in his opinion are possessed of nautical or engineering or other special skill and experience to be skilled members for the purpose of this Act. Such members shall be appointed from a list of persons to be furnished from time to time by the Board to the Governor in Council and to be prepared in accordance with regulations to be made as hereinbefore provided. The persons named on such list shall be persons who possess certain special qualifications whether nautical engineering or other of a nature and degree to be specified by the Governor in Council." The persons named on the list must, therefore, be special persons who possess special qualifications. Sec. 181 is plainly complementary to sec. 184, and shows how these persons are to be chosen. Then provision is made in sec. 185 that "a list of the names of the skilled members of the Court of Marine Inquiry shall on the first day of January and the first day of June in each year be compiled by the secretary and opposite the name of such member the nature of the special skill possessed by such member, whether nautical engineering or other shall be specified in such list. . . . Whenever a Court of Marine Inquiry is to be constituted . . . the president of the Board shall by notice in writing under his hand require the members appearing from the list to possess skill of the particular nature likely to be required in such investigation and standing next in order for duty thereon . . . to attend for the purpose of such investigation." It is admitted that the list, which was prepared in

accordance with the provisions of sec. 181, divides and classifies the various skilled persons into those who are masters of sailing vessels, masters of steamships, engineers, pilots and exempt masters, and those having scientific experience, and therefore it is plain that pilots and exempt masters are put there in apposition to masters of sailing vessels and steamships. An exempt master may be a master of a steamship, but he is put on the list, not because he is a master, but because he is a pilot. We may take it that the first two classes are the nautical members, viz., masters of sailing vessels and masters of steamships. Therefore, under the circumstances, Captain Forbes was entitled to be tried by a Court, two of whose members should have been masters of steamships; only one such master was on the Court, viz., Captain Russell—the other member was a pilot or exempt master—and therefore there was no Court properly constituted to try Captain Forbes.

It was also argued, on the other hand, that the Court was not constituted properly in order to try Pilot Blanchard. It is the same proposition but the other way round. There was one pilot and one master of a steamship, but we need not go into that. I think the effect of the section is clear, and that a master means a master and not a pilot or exempt master. I think therefore that grounds 3, 4, and 5 have been sustained.

The sixth objection was that no proper or definite charge was made against Captain Forbes enabling the Court to suspend his certificate. As to that I think *In re Bell* (c) is an authority to show that the charge as framed is sufficient; and an examination of sec. 183 warrants the conclusion that a charge may be a general charge of misconduct, but in order that a certificate may be suspended the result must be founded on a gross act of misconduct. Sec. 183 (2) provides that "The Court of Marine Inquiry is hereby authorized to hold formal investigations for the purpose of making inquiry into charges of incompetency or misconduct on the part of certificated masters . . . and when any such investigation is directed by the Board to be held into the alleged incompetency or misconduct of any master . . . the said

(c) 18 V.L.R. 55.

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Court of Marine Inquiry shall hold the same and may determine that any such certificate held by a master should be cancelled or suspended if such master upon any such investigation shall—(a) be found guilty of a gross act of misconduct drunkenness or tyranny ; (b) be found to be incompetent ; (c) be found to have occasioned by his wrongful act or default the loss abandonment of or serious damage to any ship or loss of life.” I think, therefore, that there is nothing in the sixth objection, and that the charge was right enough, and that if there was a Court dealing with the case which was itself rightly presented having regard to the status of the accused person before it, and if the Court was properly constituted under the Act, I think the form of the charge as against Captain Forbes would be a lawful charge.

As to the seventh objection, I think that as this was a *quasi*-criminal matter, involving forfeiture of his means of livelihood, Captain Forbes has a right to demand that the Act will be rigidly construed. It brings in something new not provided by common law, and it creates a particular offence followed by important consequences, and that particular offence must be found proved. The Legislature intended that a distinction should be drawn between a gross act of misconduct and misconduct generally. As I have already pointed out, sec. 183 (2) provides that if in the course of an inquiry it is found that a master has been found guilty of a gross act of misconduct, such as drunkenness, tyranny, &c., he is liable to have his certificate cancelled or suspended, although nothing came of such act at all, and no damage was done. As, for instance, suppose that it was found that a captain in anger put his helm in such a position so that, but for the skill of a captain in another ship, he would have run that other ship down, that might be a gross act of misconduct, the result of which, however, was avoided by the captain of the other ship, and no damage ensued, but it would still be a gross act of misconduct for which the wrongdoer's certificate might be suspended. On the other hand, although his misconduct need not be indicated as a particular gross act of misconduct, if the evidence establishes the fact that he was guilty of a wrongful act in

the management of the ship, not being a gross act of misconduct, and loss of life ensued, then, although the misconduct was not gross, he would be liable to have his certificate suspended; that is, because a lesser offence caused the greater damage in the one case, and in the other because the gross act of misconduct, although without damage, entails the same consequences. There is a distinction between the two classes of cases, and it is for the Court to determine which of them a man has been guilty of. The evidence might in a general way show that a man was guilty of default in navigation, but not of a gross act of misconduct. The Court must, therefore, find the offence that he is guilty of. If the Court aimed at finding Captain Forbes guilty under sec. 183 (2) (a) they have found him guilty of "gross misconduct," but not of a "gross act of misconduct." The distinction is plain—a man may be guilty of misconduct of a general kind, such as that in his way down the river he was yawing all over the place, or going out of his course, etc., and, although guilty of gross misconduct, unless it could be defined as one particular act relied upon, it would not be a gross act of misconduct. They would have to find some particular act, such as that he was asleep, etc.; but if the facts show that the captain did some special gross act of misconduct, such as deliberately running into another ship, then for that he might be convicted. He is entitled to have the offence found against him as an offence directed by the Act. The words used in the Act are a "gross act of misconduct," and those words should be given effect to. In the present case the charge as found is not in the terms of the Act, and therefore it is bad.

The eighth objection means that, supposing judgment as found was good, although I have held it to be bad, the evidence does not support it. I say as to that that the evidence might support it; the facts found by the Court are such as, to my mind, to show that if Captain Forbes had looked at the lights staring him in the face the collision would not have happened, and therefore that, if so found, might have amounted to a gross act of misconduct, and one which the evidence would have sustained. I may say as to the seventh objection that I am not certain whether *certiorari* is not the appropriate remedy,

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but Mr. Cussen can take the rule on this point at his client's risk. The rule will be absolute without costs.

Solicitor for Captain Forbes: *W. H. Croker.*

Solicitor for the Marine Board, etc.: *Guinness, Crown Solicitor.*

W. H. M.

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December 9, 10,
14, 15, 16, 20.

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ESSENDON LAND AND FINANCE ASSOCIATION LIMITED *v.* ANDREW KILGOUR.

Company—Member—Allotment of shares—Directors—Appointment—Call—Action—Delay—Acquiescence—Companies Act 1890 (No. 1074), s. 67, Second Schedule, Table A, art. 71.

Sec. 67 of the *Companies Act 1890* should be construed liberally. Where *de facto* directors make a call in the honest belief that they were duly appointed, such a call is valid under the section, notwithstanding the discovery afterwards of a defect in their appointments.

Secus, where there has been no appointment of directors at all.

The judgment of Hood, J., affirmed.

Per Hood, J. It is the duty of a person who knows that he is considered by the members of a company to be a member of that company and who acts as such to ascertain the nature of the company. Where circumstances occur which are calculated to raise in such person's mind a suspicion that the company is not identical with that which he had agreed to join, but no inquiry is made, and he allows his name to remain on the share register for years, he cannot afterwards repudiate his liability for calls.

ACTION.

The facts sufficiently appear in the judgment of Hood, J.

Topp and Cussen for the plaintiff.

Isaac A. Isaacs (A.G.) and Irvine for the defendant.

HOOD, J., read the following judgment:—Early in 1890 the defendant, Andrew Kilgour, was the holder of 500 shares of 5*l.* each in the Essendon Land, Tramway and Investment Company Limited, hereinafter called the Tramway Company. This company had bought land to a large extent, and was in great financial difficulties. In the report of the directors for the half-year ending 28th February 1890 reference was made to the position of the company and to the fact that the directors were

endeavouring to form a new company to carry out a scheme by which it was hoped that the shareholders in the Tramway Company would be saved from loss. At the same time a prospectus was issued of the "New Essendon Land and Finance Company Limited," capital 300,000*l.* in 150,000 shares of 2*l.* each, 2*s.* 6*d.* to be paid on application, 2*s.* 6*d.* on allotment, and further calls if required, not to exceed 2*s.* 6*d.* per share, at intervals of not less than three months. This new company was to purchase from the Tramway Company about 500 acres, being the unsold portion of the Buckley Park Estate, and about 640 acres fronting Keilor road. Each shareholder in the Tramway Company was to apply for the same number of shares in the new company as he held in the old, and buy land to the extent of his share obligation. It was afterwards discovered that this scheme could not be carried out in accordance with the prospectus, and a variation was proposed, and at the general meeting of the company held on the 25th April 1890 this was explained and the matter discussed; but I am not satisfied that the defendant was present, or that this alteration was brought to his knowledge then. The main change was that the new company was only to deal with the Buckley Park Estate, a change much in favour of the shareholders, and one which anyone who agreed to accept the first scheme would readily endorse. At this general meeting a committee of shareholders was appointed to inquire into the scheme. On the 14th May 1890 the directors of the Tramway Company sent out a circular to the shareholders urging them to apply for shares in the new company, and setting out the proposed scheme. At the foot is a notice calling a meeting of a new company, with the name of the "Essendon Land and Finance Association Limited," and in the inside is the report of the committee appointed at the meeting of the 25th April. That report refers to the properties named in the prospectus, although that prospectus related to a company differently styled and having wider scope. There is also in this circular a form of application for shares in the Essendon Land and Finance Association Limited. The defendant received these documents, and on 23rd June he wrote to the secretary of the Tramway Company as follows:—

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"I had your circular. I think I will join the new company. Let me know what I have to pay, as I don't know—is it 2s. 6d. a share, or what is it?" In reply, he was informed that the application fee was 2s. 6d. per share, and on the 25th June he wrote—"Your note of yesterday to hand. Enclosed please find cheque, application fee for 200 shares in the new company, 2s. 6d. a share, 25l." A receipt for this was sent to the defendant, headed in the name of the "Essendon Land and Finance Association Limited." On the 30th June 1890 the memorandum of association of the new company was registered as the "Essendon Land and Finance Association Limited," and on the 1st July Messrs. Cooper, Pierce, and M'Robert, acting as subscribers of the memorandum of association, allotted to the defendant 200 shares in the new company upon his letter of application of the 25th June. Upon the 1st July the defendant signed the application form which had been sent to him. This form had been printed for the New Essendon Land and Finance Company Limited, and as printed contained references to the prospectus. When produced in Court the paper had been altered. The name was changed to that of the plaintiff, and the allusions to the prospectus had been struck out. The defendant based one of his defences upon these changes, for he contended that that document was his real application, and that the alterations were made after he signed. With this I do not agree, as I am satisfied that the document was corrected before it was sent to him. The defendant afterwards paid another 25l. on allotment, and his name was inserted in the register of shareholders. On 15th September 1890 the new company purported to register articles of association, and then carried on business up to this year as under those articles. In August 1891 and August 1892 the company paid dividends, and his share was duly paid to the defendant, who signed receipts to the company. The defendant took up land in accordance with the scheme of the new company, paid for it, and obtained title thereto. In 1895 the City Bank, where the new company had a large overdraft, went into liquidation, and the liquidator began to press the company. In October 1896 a call was made, and notice sent to the defendant, and on 19th October the defendant replied, in no way repudiating member-

ship in the company, but expressing surprise at a call being made, as he thought he was free from further liability when he paid for the land. A correspondence ensued, and ultimately the new company took legal advice. It was then discovered that owing to the non-registration of the articles at the same time as the memorandum, the articles were of no effect, and the company was really under the provisions of Table A to the *Companies Act 1890*. Various steps were taken in the endeavour to cure this defect. On the 7th April 1897 a meeting of the signatories of the memorandum of association was held, at which were present Messrs. Cooper, Ogilvie, and M'Robert. The other signatories were Messrs. Price, Pierce, and Upton. Of these Pierce was dead, Price had assigned his estate, and Upton received notice of the meeting, but did not attend. At this meeting it was resolved to call a meeting of shareholders to ratify all that had been done, and to reduce the number of directors to three, and appoint Messrs. Cooper, Crespin, and Bradshaw to be such directors. The meeting of shareholders was duly held on the 21st April, and the resolutions carried as above. Subsequently these directors made the calls now sued for.

The defendant set up many defences, but the only material ones are:—(1) That he never was a shareholder in the company; and (2) That if a shareholder, the call was not legally made. The other points raised on the pleadings were not argued.

It was contended in support of the first point that the plaintiff company is a different one from that which defendant agreed to join. I think that when the defendant wrote his letter of the 25th June 1890, his reference to the "new company" must be taken to apply to the company mentioned in the last circular that he received—viz., "The Essendon Land and Finance Association Limited," which is the plaintiff's name. But I also conclude that the company to which the defendant referred was the one with the objects mentioned in the prospectus, notwithstanding the alteration in the name. His offer was accepted by the plaintiff, a company having objects substantially differing from those set out in the prospectus, and so far therefore there was no contract. But though there may have been no contract in the first instance there are many other facts to be considered before

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it can be said that the defendant is not now a member of this company. Did the defendant subsequently know of the change in the company, and did he with knowledge acquiesce in such change? If so, he is a member, though originally there was no contract. Now the alteration in the objects of the new company by which the new shareholders were to take over one piece of land instead of two would be a great inducement to join it, providing, as was the case, that the Tramway Company was relieved of responsibility for the other land. The fact that calls could only be made every three months might or might not be important according to the defendant's belief as to the probability of a call being made. This being the state of his mind, he had almost immediately a warning that something new had occurred. The document of the 14th May referred to a company differing in name from that in the prospectus, but his attention is most pointedly drawn by the alterations and erasures in the document of 1st July. Whatever else may be said about the defendant he is certainly no fool, and I think he was put upon inquiry. He knew then that some important variation had been made in the scheme proposed in the prospectus, but he did nothing. He knew that he was a member of a new company having the same name as the plaintiff company. He received dividends from that company. He accepted an indemnity from that company, legal or otherwise, to save him harmless against calls in the Tramway Company, and took no steps for seven years to see whether the company he was supposed to be a member of was the one that he intended to join. From July till, at all events, the 12th September, 1890, when the articles were signed, the defendant, by making inquiries, could have ascertained his position, and he would have been told that he was a member of the plaintiff company, with a memorandum of association registered, but no articles, and therefore under Table A. Whether he would have been any wiser for this information may be doubtful. He would, however, have learnt that the memorandum differed from the prospectus, and could then have taken any steps that he thought fit to relieve himself from responsibility. I think that the inference is that he knew of, and was indifferent to, the change. In 1896, when a call was made, the

defendant replied to the secretary of the plaintiff company, and even then raised no objection as to being a member; though if his story be anywhere near the truth, he then knew that the plaintiff company was not the one described in the prospectus. He says that he received, considerably more than two or three years ago, a copy of the memorandum and articles, and knew that they were not correct, and yet he did nothing. He had notices and circulars from the company. He says that he put these documents in the waste-paper basket. But why? How did he know that they were wrong? And if he did know why did he not say so? It is said that the memorandum of association and articles which the defendant saw differ from those of the plaintiff company. This is correct. The plaintiff company is under the articles in Table A, and not under those that were registered, and the two differ. But I think this immaterial. The memorandum is the chief thing that the defendant would read, and it would show him the constitution of the company. In this way I think the defendant is bound. Moreover, it was the defendant's duty to ascertain the nature of the company in which he knew he was considered to be a member: *Peel's Case* (a). Especially is this so when, as here, the altered application form, with change of title, should have raised his suspicions. Defendant's name has been for years on the share register of this company, and he has failed to satisfy me that he ought now to be allowed to repudiate liability on this ground.

Upon the second point various objections were taken to the validity of the call, founded upon the confusion that arose after the discovery of the irregular registration of the articles. The proper making of the call depended upon the proper appointment of the directors who made it, and that ultimately got back to whether the meeting of 7th April 1897 was duly constituted or not, much turning upon whether notice should have been sent to Price. I am inclined to think that several of these objections are well founded, but I need not discuss them *seriatim*, for in my opinion they are all answered by sec. 67 of the *Companies Act* 1890, and by Article 71 of Table A to that Act. Sec. 67 is extremely wide in its language, and should be liberally

(a) [1867] L.R. 2 Ch. 674.

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construed. The persons who made these calls were *de facto* directors, honestly believing that they were duly appointed; and I think that their acts should be protected, notwithstanding any defect that may afterwards be discovered in their appointments: See *Buzolic Paint Company v. Cornwell* (b); *Federal Mutual Live Stock Co. v. Donaghy* (c); *Briton Medical Association v. Jones* (d); *Murray v. Bush* (e). It was urged that this section only protects errors in procedure and not mistakes in jurisdiction, and only covers cases where what has been done could lawfully have been done provided certain formalities had been attended to. I cannot see that the line can be so finely drawn as this. The substantial objection here is that the directors who made the call were not properly appointed by reason of various errors in the previous proceedings. But still these directors were appointed, and appointed by the shareholders in general meeting. If that meeting were improperly summoned owing to previous irregularities, or if what was done at the meeting was not strictly legal, still I think it all amounted to a defect in the appointment of the directors, and therefore would be covered by sec. 67. The cases relied upon for the defendant have different objects and different procedure to the present. The chief one, *John Morley Building Co. v. Barras* (f), was an application to restrain the defendants from further acting as directors; and, therefore, while it may establish the invalidity of their appointment, it has no bearing on the effect of sec. 67. In my opinion, therefore, the defence fails, and there will be judgment for the plaintiff for 50*l.* 9*s.* 4*d.* and costs.

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From this judgment the defendant appealed.

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Isaac A. Isaacs (A.G.) and *Irvine* for the appellant—Sec. 67 of the *Companies Act* 1890 was not intended to cure every case where the appointment of directors was irregular.

[MADDEN, C.J.—Wherever directors act *bonâ fide* in the belief of themselves and of others that their appointment is valid, then,

(b) [1885] 11 V.L.R. 371.

(e) [1872] L.R. 6 H.L. 37.

(c) [1888] 14 V.L.R. 857.

(f) [1891] 2 Ch. 386.

(d) [1889] 61 L.T. 384.

from whatever source the irregularity proceeds, their acts are valid.]

The authorities do not go so far. The irregularity curable under sec. 67 must not be fundamental. Clause 71 of Table A settles the matter as regards members of the company. Sec. 67 implies that a properly appointed authority should exercise the power of appointment. If while making the appointment the procedure or the qualification of the persons appointed was defective, but not radically defective, the acts of such persons would be held to be valid, though the appointment is not valid when the contrary is proved.

[HODGES, J. I should have thought that where persons are sitting in the office of a company, and carrying on, or appearing to carry on, the business of directors, all their acts should be taken to be the acts of the directors. I should think that sec. 67 was intended to go thus far, as between members of the company *inter se*.]

The words of the section are—"notwithstanding any defect that may afterwards be discovered in their appointments or qualifications." The words "until the contrary is proved" create a difficulty. They should not mean "until the directors themselves discover it," because then the company could take advantage of the wrong by its own directors; and it cannot be discovery by a third person, because then the company could take advantage of the discovery by a third person. A late authority, *Dawson v. The African Consolidated Land, etc., Co.* (g), deals with the question of qualification of directors. In that case there was power to do the acts, but the persons who did them chose the wrong way of doing them. The same point is referred to in *Briton Medical Association v. Jones* (h).

[HODGES, J. In *In re East Norfolk Tramways Co.* (i), Brett, L.J., says he does not agree with *Houbeach Coal Co. v. Teague* (k).]

But not upon this particular point. His remark is directed rather to the number of persons who could exercise a power.

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(g) [1898] 1 Ch. 6.

(h) 61 L.T. 384.

(i) [1877] 5 Ch. D. 963.

(k) [1860] 5 H. & N. 151.

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Assuming that there was not that power, the Lords Justices did not say that the acts would have been valid.

[HODGES, J. It is all one question. Are the directors validly appointed?]

In *Howbeach Coal Co. v. Teague* the persons who failed had to maintain two propositions—(1) that the appointment of directors was invalid; (2) or, granting that it was valid, that their acts were invalid. Brett, L.J., was, in *In re East Norfolk Tramways Co.*, dealing with the first of these points. A defect in power does not come under the section, but only a defect in the formality to be observed in proceedings. *Buzolic Co. v. Cornwell* (l) does not touch the question at all. In *Federal Mutual Live Stock Co. v. Donaghy* (m), the point decided came clearly within the rule—that is, a mere want of regularity in the mode of exercising the power. That case assumes that the subscribers never purported to appoint directors. If the right persons did not appoint, the section has no application.

[HODGES, J. The right persons might have made the appointment, but in a wrong manner. Sec. 67 would supply the imperfection in procedure. For example, if a resolution was necessary, or if the appointment was imperfectly put on record.]

With regard to the notice to Price, a majority of subscribers may act, provided notice be given to all. The latest authority as to the necessity for a meeting, and its legality, *In re Portuguese Consolidated Copper Mines Limited* (n), establishes the proposition that in order to constitute a valid meeting there must be notice to all persons who have the right to attend.

Counsel referred also to *John Morley Building Co. v. Barras* (o); *Tyne Mutual Steamship Association v. Brown* (p); *Imperial Hydropathic Hotel Co. v. Hampson* (q).

Topp and Cussen for the plaintiff respondent were not heard.

(l) 11 V.L.R. 371.

(m) 14 V.L.R. 857.

(n) [1889] 42 Ch. D. 160.

(o) [1891] 2 Ch. 386.

(p) [1896] 74 L.T. 283

(q) [1882] 23 Ch. D. 1.

MADDEN, C.J. In this case we do not find any such difficulty as should make us hesitate as to our decision. We do not say that the case is clear. There are some elements of difficulty about it, but we feel that, upon the whole, the judgment of the learned primary Judge was right.

Two points were relied upon by the defendant in support of his appeal, the first of which is that he had never contracted to become a member of the plaintiff company, and that his action, after it was assumed or believed that he had become bound as a member or shareholder, was not such as to amount to an acquiescence which would make him liable to the company to the same extent as if he had contracted originally to become a member. The learned primary Judge has found on the facts that the defendant had undoubtedly acquiesced, even although there had been originally some defect in his contract to become a shareholder. There were clearly facts which would warrant the learned Judge in coming to that conclusion. (His Honor referred to these facts.) Therefore, that view of the learned Judge was right.

Then it is said that, supposing that otherwise the defendant might be liable, he is not liable in the present case, because the calls were not made by directors properly appointed. As to that, what happened was this: When the company was registered, articles of association were adopted, and in them certain persons were nominated as directors. The articles were not registered on the same day as the memorandum was, as required by the Act. Therefore, those articles were valueless as articles of association. The result was that there were no directors appointed by the company itself, and no articles of association except those known as Table A under the Act, according to the provisions of the Act. Table A provides that where no directors have been appointed by the company, those persons who originally signed the memorandum shall be and act as the directors until they shall have duly appointed other directors. The result in this particular case is, that the true directors of this company were those gentlemen who originally signed the memorandum. Afterwards, one of them died, another assigned his estate, and a third disappeared somewhere. It was necessary to get directors,

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presumably to make this call, amongst other things. And then a difficulty apparently arose. The parties concerned do not appear to have known what they should do. They did not understand their legal position, but they tried to make the best of it. The available subscribers to the original memorandum—i.e., the directors by legal intendment—met and thought that the proper way to appoint directors was to nominate as directors certain persons whom they did nominate; to call a meeting of the shareholders, and ask them to adopt that nomination—practically to approve of the three persons nominated as directors. The shareholders were accordingly called together, and they adopted resolutions which affirmed the existence as directors of these three persons. These three made the call, acting as directors, and apparently thereafter conducted the business of the company generally, with everyone's acquiescence. The plaintiff here relies on the *Companies Act* 1890, sec. 67. It may be assumed that the appointment of these directors would, apart from that section, be illegal. (His Honor read the latter portion of the section.) The plaintiff says that, although the appointment was bad but for the Act, the Act has validated the appointment and the acts done by the appointees. We think that is correct.

It has been much debated before us as to whether that portion of the section which I have read applies to the kind of defect which has arisen here. It is said that where those who have the right to appoint affect to appoint, but appoint defectively, the Act cures that, but that where those who have not the power to appoint affect to appoint, that is a thing which cannot be cured. We do not propose to define precisely what is meant by this part of sec. 67. It is a section which had better be left without applying specific limits to its operation by judicial interpretation. It is a section in which the Legislature intends to deal generally with honest defects in the administration of companies, and particularly in the matter of the appointment of directors, because the Legislature saw that, if it were possible afterwards to upset an appointment of directors, who are the executive body of a company, for any mistake or misapprehension in their appointment, the whole of the subsequent pro-

ceedings of the company might be annihilated. That would be ruinous to the company. Therefore, the Legislature has intended, to an extent which we do not define, that defects of that kind shall be deemed to be cured by the section in a considerable variety of cases. We think, however, that this is unquestionably a class of defect which was intended to be covered and cured by the section. It was submitted to us that the section could not apply because the office was full—i.e., the persons who filled the office of directors were the subscribers to the original memorandum. And presumably, if the office were full, and without any action on the part of the subscribers some other wholly unauthorized persons had sought to appoint directors, without getting rid of those appointed by the Act, this particular argument would possibly be very good. But where the persons who seek to procure the appointment of the persons subsequently appointed are the very persons in the office at the time, that amounts to an intention to resign from that office, though in point of law it might not be an effective resignation. There might be a distinction between that case and a case where, without their consent, some outside persons sought to fill the office.

Then it is said that the subscribers did not appoint. It is true that they did not themselves resolve on the appointment of the directors who were appointed. They did not formally resolve that the people proposed to the shareholders should be directors. But they themselves chose them out and nominated them to the shareholders in the honest belief that that was the best way to get over a difficulty then existing. They were undoubtedly desirous of putting other persons into their own places. They considered fairly the best means to do that, and they mistakenly called the shareholders together to make that appointment, instead of making it themselves. The shareholders, having been called, acquiesced in it, so that everyone concerned was anxious to make the appointment, and the only defect was that they chanced to take the mistaken course of giving effect to that opinion. It is said that the defect which exists in this case was not one which was "afterwards discovered" within the words of sec 67, and that the words "defect afterwards discovered" refer

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only to a defect in a point of law—some legal defect which was unobserved at the time, but which later was found to exist. We certainly think that that would be too narrow an interpretation. Notoriously, the most frequent cases of error of this kind are errors of fact, where, *e.g.*, there is a miscount of those present among the shareholders who voted. It might be that a poll was demanded, and not paid proper attention to at the time. It might be that someone who ought to have received a notice to attend did not. Suppose the directors had ordered the secretary to send notice to persons who ought to have had it, and the secretary became intoxicated and did not send it, would not that be cured by the Act? Yet there is no law about that. Therefore, whatever the ultimate meaning of the section may be, it means more than the settlement of mere questions of law. And it covers the present defect. It is true here that the present defect existed *ab initio*. But the question whether it was “afterwards discovered” within the meaning of the section is another thing. No one can suppose that the subscribers and the shareholders at the meeting were not honestly trying to contrive a means to effect the appointment of the directors. It is true that, later on, it was ascertained that their apprehension at that time was wrong. And in that way it was “afterwards discovered.” Of course, it was existing at the time, as the defect must always exist at the time, whether it is of law or of fact. The defect must, at all events, be one which has arisen honestly in a case where the people who had the right, or honestly believed themselves to have the right, intended to do what was proper in the matter, but erred; as contradistinguished from people who either were mere usurpers or intruders, or else people who, although they knew what the right was, determined to lay their heads together to evade it. That may be a broad interpretation, which would indicate what the section was intended to deal with, but that need not be decided, and is merely my own suggestion at the instant. We are satisfied that the section was intended to cover such a general defect as this. The appeal will be dismissed, with costs.

WILLIAMS, J. I have very little to add. On the point of

acquiescence, I have no hesitation in arriving at the same conclusion as the primary Judge. The second point argued by the Attorney-General is that these calls were illegally made, and that the last part of sec. 67—the validating part, as it has been termed—does not cure the illegality. The Attorney-General's argument, as I understand it, was that this section only validated defects or informalities in the appointment of directors, and that it did not apply to a case where there was no appointment, so to speak. He argued that, in this particular case, there was no appointment of those directors who made the call, and that therefore the call was bad. Now, if I could have agreed with him that there was no appointment of the directors in this case, I should have also been inclined to agree with the further portion of his argument—that this clause does not cover a case where there has been no appointment; *e.g.*, the instance was put of directors being nominated by a number of people in the street. That would clearly be no appointment. I think that this clause would not apply to a case like that. There, there would be no appointment at all. But I differ from the Attorney-General in this—that I think in this case there was an appointment. The subscribers to the memorandum nominated these directors, and suggested to a meeting of shareholders of the company that was called that their nomination should be ratified by this meeting of shareholders. That meeting was called, and the meeting ratified the nomination of the subscribers. All the parties then believed that the appointment was a valid one, and that they had proceeded in the right way to appoint them. As a matter of fact, it appears that they had not proceeded in the right way, and that, if it had not been for the clause in the section, the appointment would have been bad. But it was an appointment of directors within the meaning of the section. And therefore, though it appears to have been a bad appointment, it is made good by the validating clause.

HODGES, J. On the first question which was raised on this appeal, viz., that the defendant never became a member of the plaintiff company, it seems to me the evidence was very strong to show that he did. Whether, if the learned Judge had found

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that he had not become a member, the evidence would have been strong enough to justify us in setting aside the verdict as against the evidence is not for the Court to consider. We have to consider whether the evidence would support it. And as to that, the evidence was undoubtedly very strong.

The second question is more difficult. It was contended that the calls were made by persons who were not directors, and it was argued that they had never been appointed. The individuals who acted as directors appear to have been appointed in this way:—The persons who had signed the memorandum of association were the persons who had the power to appoint directors. Instead of appointing directors, they nominated individuals who afterwards acted, and having nominated them, they called a meeting of shareholders to ask them to appoint, and the shareholders at that meeting purported to appoint. So that it appears that the individuals who had the power to appoint nominated the directors; that the individuals who had the power to appoint called the meeting of shareholders, to induce or ask the shareholders to appoint; and that the individuals who had the power to appoint concurred in that appointment. Now, it seems to me that on those facts, though the shareholders purported to appoint, their act was an irregular act, and their effort was ineffectual. But inasmuch as the persons who had the power to appoint concurred in all the proceedings, and in that resolution, it is such an irregularity as would, in my opinion, be covered by the *Companies Act*, sec. 67. It was argued by the Attorney-General that the company had no power to appoint, and that the section does not validate an appointment by persons who had no power to make it. Stated in that simple fashion, very likely the argument is correct. If the shareholders of the London and Westminster Bank purported or proposed to nominate the directors of the Bank of England, and it stood simply there, this section would not validate such an act. But it is altogether different where the persons who have the power of appointment nominate and concur in the appointing, and intend at the time that what they are doing shall make the persons directors. Then it seems to me not so much that the wrong persons have appointed, as that

the right persons have appointed but have procured the other persons to approve of and concur in the appointment. Under those circumstances, I think that this section is broad enough to cover such a defect as this, and validate the irregularities in the appointing.

Appeal dismissed.

Solicitors for plaintiffs: *Hodgson & Finlayson.*

Solicitor for defendant: *J. A. Isaacs.*

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Police Offences Act 1890 (No. 1126), s. 41 (iii).—Police Offences Act 1891 (No. 1231), s. 12—Rogues and vagabonds—Imposing upon persons with a view to obtaining money—Fraudulent representation.

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The defendant as the agent for the proprietor of a newspaper took delivery of the papers for sale at three farthings per paper, the arrangement being that he was to be allowed three farthings per paper for all papers returned by him which had been so delivered to him the previous week, and which were unsold. The defendant bought papers at so much per hundredweight from other persons and included such papers in his return to the proprietor as being papers delivered to him during the previous week and which had been unsold, and obtained the allowance of three farthings for the same. An information was laid against the defendant under sec 41 (iii.) of the *Police Offences Act 1890*, charging him with imposing upon a person by fraudulent representation with a view to obtaining money. He was convicted by the justices.

Held, that under the circumstances the conviction could not be sustained.

Sec. 41 (iii.) refers to an offence of obtaining money or any other benefit or advantage by imposition, in return for nothing, and not to a contract, though procured by misrepresentation, under which something is to be given in return.

DANIEL FOX was, on the 7th July 1898, convicted by the Court of Petty Sessions at Melbourne, on the information of Thomas Prosser, for that on the 23th March 1898, at Melbourne, he did endeavour to impose by a false and fraudulent representation in writing on one David Syme, trading under the style of "David Syme and Co.," with a view to obtain a certain benefit or advantage. Fox was sentenced to one month's imprisonment with hard labour, and ordered to pay 31*l.* 10*s.* costs.

The grounds of the order to review were:—

(1.) That the evidence given did not relate to any offence

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under sec. 41, sub-sec. iii. of the *Police Offences Act* 1890, as amended by Act No. 1241.

(2.) That there was no evidence that defendant personally made any false representations in writing on 28th March 1898, or that he knew the contents of the bundles delivered at the *Age* office on the said 28th March 1898, which were alleged to contain the false representation, nor was there any false representation in writing in evidence.

C. A. Smyth to show cause.

Skinner to move the order absolute.

Cur. adv. vult.

HODGES, J. This was an application to set aside a conviction made against the defendant. The defendant had been acting, or purporting to act, as agent for the sale and disposal of the *Age* newspaper. There was an arrangement or practice under or by virtue of which the agent could return papers unsold by him during the previous week, and on the return of such newspapers he was entitled to be allowed for the papers so returned three farthings for each newspaper, being the same price he paid for them. Of course, that right and that arrangement was limited to papers which had been delivered to him to be sold, and which were returned, never having been sold. He was charged—putting the substance of the charge—with fraudulently representing certain papers which he delivered at the *Age* office to be returned papers—that is, papers previously delivered to him and which had not been sold during the previous week, and claiming in consequence a reduction of three farthings per paper; whereas, as a matter of fact, those papers were not papers which had been delivered to him during the previous week, but were, as it is alleged, papers purchased by him as waste paper elsewhere, and which had been bought not at so much per paper, but by weight at so much a hundredweight. The justices convicted him, and an order *nisi* was granted to review such conviction on the ground that the charge was not one covered by sub-sec. iii.

of sec. 41 (a) of the *Police Offences Act* 1890, as amended by sec. 12 of Act No. 1241 (b).

Now, it is contended that that does not apply to cases of a contract obtained by fraud or to any case where there has been, so to speak, a *quid pro quo*. If a person sells a horse by fraudulent misrepresentation and gets money thereby, it is said that he is not an offender within the meaning of that section. If a person sells land or procures another person to enter into a contract to buy land by fraudulent misrepresentation as to the value of the land, etc., it is said that he has not committed any offence within the meaning of that section. With some regret, I think that that view is right. In the first place it was pointed out that the section commences by saying a person committing the offences named "shall be deemed a rogue and vagabond," and if the whole of the sub-sections are looked at they will be found to largely deal with offences of a character that are usually attributed to offenders who are ordinarily considered as rogues and vagabonds. If the section had the meaning which the prosecutor put upon it, it would then mean that every person who procures any contract of any kind by any fraudulent representation might be convicted under this section. Now, while they may be rogues and vagabonds in one sense who do things of that kind, I cannot think that the section meant that in every case where a person gets a contract set aside on the ground of fraud there could be a conviction under its provisions. It was not meant to be as wide as that in its effect, so as to cover fraudulent pretences and a vast multitude of cases which would not be reached under the charge of false pretences. I am led to that conclusion not only from that view but also from the very language of the sub-section. In the first place it is "imposing or endeavouring to impose," and although a person who procures a contract by fraud may, in a certain

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(a) "Sec. 41. (iii.) Any person imposing or endeavouring to impose upon any charitable institution or private individual by any false or fraudulent representation either verbally or in writing with a view to obtain money or any other benefit or advantage."

(b) "Sec. 12. In sub-section (iii.) of section forty-one of the *Police Offences Act* 1890 for the words 'charitable institution or private individual' the words 'person or charitable institution' shall be substituted."

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sense, be said to be "imposing or endeavouring to impose," I think that when you look at the words immediately following you find the kind of imposition with which the Legislature were dealing. The section refers to an imposition by one person imposing on another to get something by dishonest representations, but getting that something as a rule in return for nothing. Not, by a dishonest representation, procuring a larger amount for an article he has to sell than he otherwise could procure, but procuring something in consequence of a representation for nothing. Although the word "person" is not confined to a charitable person, it is to be an imposition upon a person. This appears more plainly when the other words are looked at—"with a view to obtain money or any other benefit or advantage." There is no doubt that if a person obtains a contract by which another individual promises to pay more than the article offered is worth, he does obtain an "advantage," but I do not think that that is the "advantage" referred to in that section. I think the "advantage" is an "advantage" in respect of which nothing is given; I think the "benefit" is a "benefit" in return for which nothing is given. I do not say that in every case the giving of something would destroy the effect of the imposition, but that that is the class of case aimed at. That being so, I must, with some regret, make this order absolute. I shall do so, however, without giving any costs.

Order absolute without costs.

Solicitors for informant: *Gillott, Bates & Moir.*

Solicitor for defendant: *Gaunson.*

W. H. M.

MARSHALL v. FOSTER.

Merchant Shipping Act (Imperial) 1894, 57 & 58 Vict., c. 60, s. 225, sub-s. 1 (b)
 —29 Car. II., c. 7, s. 1—*Sunday labour—Seamen and firemen—Vessel in port*
 —*Lawful command, wilful disobedience of—Mens rea—Honest belief as to*
unlawfulness of command.

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Seamen and firemen are not included in the words "tradesman artificer workman labourer or other person" in the statute 29 Car. II., c. 7.

Accordingly an order given to a seaman or fireman on a vessel in port to do work on a Sunday is a lawful command.

The maxim "*Actus non facit reum nisi mens sit rea*" applies to excuse a defendant from an act which would otherwise be unlawful only where the belief on which the defendant acts is a belief as to facts and not as to law.

R. v. Mollison (2 V. L. R. (L.) 144) explained.

ORDER to review a decision of the Court of Petty Sessions at Melbourne.

The defendant was a fireman employed upon the steamship *Bulimba*. On the morning of Sunday, 16th January 1898, the informant, the master of the ship, ordered the defendant and others to go to work for the purpose getting the ship to sea. The defendant refused to go to work and he and those with him stated that the refusal was made as a matter of principle, on the ground that they were not compelled by law to work on Sunday while the vessel was in port. They were presented at Petty Sessions for disobedience, and the Court was of opinion that a breach of the law had been committed, but the lowest possible penalty was inflicted, and the defendant and the others were imprisoned until the rising of the Court. The present proceedings were then taken by the defendant as a test case. The grounds of the order to review were that—

- (1.) The alleged disobedience was not wilful.
- (2.) The defendant did not act without reasonable excuse.
- (3.) The commands were not lawful.

Mitchell to show cause cited *Sandiman v. Breach* (a); *Reg. v. Silvester* (b); *Fenton v. Row* (c); *McHugh v. Robertson* (d); *Garton v. Coy* (e).

(a) [1827] 7 B. & C. 96.

(d) [1865] 11 V. L. R. 410.

(b) [1864] 33 L. J. (M. C.) 79.

(e) [1873] 4 A. J. R. 100.

(c) *Argus*, Dec. 7, 1864.

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Cussen (Wasley with him) to move the order absolute cited Reg. v. Cleworth (f); Smith v. Sparrow (g); Fennell v. Ridler (h); Rider v. Wood (i); Seth Turner's Case (k); Reg. v. Mollison (l).

Mitchell called on in reply cited, as to the question of mens rea, Bank of New South Wales v. Piper (m).

Cur. adv. vult.

HOOD, J. The defendant at all times material to this case was a fireman upon the steamship *Bulimba*, and also a seaman within the meaning of the *Imperial Merchant Shipping Act* 1894. He was convicted of an offence against the provisions of that Act for wilful disobedience of a lawful command on Sunday, 16th January last. It appeared that the defendant, being of opinion that he was not bound by law to work on Sundays, had refused to do so as a matter of principle, in order to test the question, and the case was tried upon the basis that the defendant honestly believed that he was right. Against that conviction an order *nisi* to review was obtained, with which this Court has now to deal.

It was first contended that the captain's order to work on Sunday was not a lawful command. This point turns upon the statute 29 Ch. II., c. 7, called "An Act for the Better Observation of the Lord's Day, commonly called Sunday." This Act was passed in England in 1676, and is in force here: *Fenton v. Rowe (n)*; *Ronald v. Lalor (o)*; *Garton v. Coy (p)*. The first section provides "that all the laws enacted and in force concerning the observation of the Lord's day and repairing to the church thereon be carefully put in execution and that all and every person or persons whatsoever shall on every Lord's day apply themselves to the observation of the same by exercising themselves thereon in the duties of piety and true religion publicly and privately and that no tradesman artificer

(f) [1864] 4 B. & S. 927.

(g) [1827] 4 Bing. 84, Park J., at pp. 88, 89.

(h) [1825] 5 B. & C. 406.

(i) [1859] 2 E. & E. 338.

(k) [1846] 9 Q.B. 80.

(l) [1876] 2 V.L.R. (L.) 144.

(m) [1897] A.C. 383.

(n) *Argus*, Dec. 7, 1864.

(o) [1872] 3 A.J.R. 87.

(p) 4 A.J.R. 100.

workman labourer or other person whatsoever shall do or exercise any worldly labour business or work of their ordinary callings upon the Lord's day or any part thereof (works of necessity or charity only excepted)." That being the law, if the defendant is within the statute an order to him to work on Sunday would not be a lawful command, unless in case of necessity or charity, which does not arise here. It was urged for the defendant that he is within the statute as being a labourer, or else included in the general words that follow. With this argument I am unable to agree. The description "labourer" is a wide one, and might perhaps sometimes include a fireman, but hardly an ordinary seaman. But it has been pointed out in several cases that the classes enumerated in the Act are placed in a sliding scale from tradesmen to labourers. The labourers mentioned are therefore considered by the Legislature as something inferior to workmen. I do not think that this could properly be said of either seamen or firemen, and I think that the labourers referred to must be something more akin to what are now known as "farm labourers," "workmen's labourers," or "day labourers." Nor would the general words in the Act cover the defendant, as these, according to decision, have to be construed *ejusdem generis*. But in my opinion seamen or men of a similar kind are not within the Act for other reasons. It seems to me that if such a large and well-known class was aimed at the Legislature would have specially named it (see *R. v. Cleworth*) (q), and considering how frequently vessels have sailed from British ports on Sundays during all the years that the statute has been in force, the absence of any previous attempt to bring sailors within the Act is not without weight. The statute, too, on its face, bears indications that it does not extend to seamen or persons on board ship. By sec. 4 all prosecutions must take place within ten days after the offence is committed. This provision would render the Act nugatory as regards sailors who went away to sea on Sunday. Again, the reference in sec. 1 to repairing to church, if applied to sailors, could only mean when they were in port, and no such limitation is stated in

(q) 4 B. & S. 927.

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the Act. The same remark applies to the reference to the parishes in sec. 2. And the laws that are by sec. 1 to be put into execution relate solely to persons who dwell on land and cannot apply to those who go down to the sea in ships. For these reasons I think that the defendant is not within this statute, and that therefore the captain's command was lawful. It has been said that it is hard that seamen in port should not have a day of rest, and that shipowners are oppressing their *employés* by sending ships to sea on Sundays. This may be so, though much depends upon the contract between the parties. On the other hand, as the Act is penal, if it applied to seamen they would be compelled to observe Sunday whether they wished to or not, and no matter what their religious opinions might be, and, as was pointed out during the argument, very wide-reaching results might follow. No ship could leave port on Sunday. No ship could pass the Heads inwards on Sunday. Even at sea if the weather were calm no work should be done, and probably if firemen are within the Act all Sunday trains would cease. With neither of these views, however, has this Court any concern. It is the Legislature alone that can intervene. Parliament must decide whether or not it is wise to endeavour to enforce by penal laws "the duties of piety and true religion;" but I cannot help remarking that if such an attempt is to be made it should be made by a modern legislature acquainted with modern ideas, instead of such a subject being left to the chance application of an almost obsolete statute, partial and limited in its operation and uncertain in its results, especially so when applied to a state of society totally different from that which existed when the Act was passed.

It was next argued that, assuming that the captain's order was lawful, yet, as the defendant honestly believed it to be unlawful, the conviction cannot be sustained. This contention was supported by reference to what is known as the maxim of *mens rea* or the "guilty mind." This maxim has been the subject of elaborate discussion on several occasions: See *R. v. Prince* (r); *R. v. Tolson* (s); and *Bank of New South Wales v. Piper* (t).

(r) [1875] L.R. 2 C.C.R. 154.

(s) [1889] 23 Q.B.D. 168.

(t) [1897] A.C. 383.

It is pointed out in these cases that the phrase *mens rea* is a misleading one, and all that it really means is the mental element necessary in most cases to constitute a crime—a state of mind which arises solely on questions of fact. In *R. v. Prince*, Brett, J., said—"It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe and does believe to be the facts, would, if true, make his acts no criminal offence at all" (u). And Sir Richard Couch, in the Privy Council, says—"The absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent" (v). This principle has been applied by our Court in the case of bigamy: see *R. v. McMahon* (w); *R. v. Adams* (x). Now, in the present instance, the defendant was under no mistake as to the existence of any facts. All the facts of the case were exactly as he believed them to be. He knew that the captain had given an order. He knew that the order was a usual one. But he wilfully disobeyed that order under the honest belief that he was justified in doing so as a matter of law. His mistake therefore was not of fact, but of law; and this neither shows any absence of *mens rea* nor does it afford any defence (see *Stephen's Com.*, vol. iv., p. 103), except of course where otherwise provided by statute; and even the absence of *mens rea* is not always an answer to a statutory charge. Great reliance was placed, on behalf of the defendant, upon the case of *R. v. Mollison* (y). This case is binding upon me if in point, and in consequence of it I have gone more fully into this matter than I otherwise would have done. It decides that a servant who absents himself from his employment in the *bond fide* belief that he has a right to do so is not liable to a conviction for unlawfully absenting himself, though he be mistaken in his belief. If this mistaken belief is on facts so as to bring the case within the principles to which I have referred, then the

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(u) L.R. 2 C.C.R., at p. 169.

(v) [1897] A.C., at p. 389.

(w) [1891] 17 V.L.R. 335

(x) [1892] 18 V.L.R. 566.

(y) 2 V.L.R. (L.) 144.

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decision does not assist the defendant. But in the judgment are remarks which have been cited as showing that a *bond fide* mistake as to the law would excuse the defendant. If I thought that such a point was really decided, I should have referred this case to the Full Court, to have the matter reconsidered. But I think that the last paragraph of the judgment shows that the mistake which the defendant was held to have made in that case was in believing that an English trade custom had been adopted here. This would be a question of evidence, and therefore one of fact. This also appears from the cases cited in the judgment, which would not support the view that ignorance of the law constitutes a defence. One of these is *Reg. v. Prince* (z), where the contrary is distinctly laid down, and where the only mistake in question was one of fact. Another case referred to in that judgment was *Nicholls v. Hall* (a), which decides that knowledge of the facts is an essential ingredient of the particular offence therein dealt with. A third authority was *Turner's Case* (b). There a conviction which alleged that a servant absented himself from his service was held bad for not saying that he did so without lawful excuse. But it is clear that the lawful excuse meant was one of fact, as appears by the examples given of accident, sickness, or the master's permission. The other decision cited was *Rider v. Wood* (c), and that is precisely the same as *Turner's Case*. I think therefore that, notwithstanding the generality of some of the remarks in *Reg. v. Mollison*, that case does not lay down the doctrine contended for on behalf of the defendant here. In my opinion the decision of the magistrates was correct, and the order *nisi* will be discharged with costs. As this matter is of general importance, I would have sent it to the Full Court had I been requested to do so, but in the absence of such request I have not felt justified in putting the parties to any further expense.

Order nisi discharged.

Solicitors for informant: *Malleson, England & Stewart.*

Solicitors for respondent: *Farlow & Barker.*

A. F. M.

(z) L.R. 2 C.C.R. 154.

(b) 9 Q.B. 80.

(a) L.R. 8 C.P. 322.

(c) 2 El. & El. 338; 29 L.J.M.C. 1.

[IN CHAMBERS.]

DALGETY AND CO. LIMITED v. BROWN.

1898
August 11.
Hodges, J.*Practice*—"Rules of Supreme Court 1884"—Order XV., r. 1—Accounts and inquiries—Order for foreclosure.

In an action by a mortgagee claiming accounts and foreclosure, the plaintiff may obtain under Order XV., r. 1, an order for an account, with all necessary inquiries, and the usual directions as in an order *nisi* for foreclosure.

THIS was a summons under Order XV., r. 1, on behalf of the plaintiff for an order for accounts, and for an order *nisi* for foreclosure. The plaintiff was a mortgagee in possession under a mortgage given over land under the general law by one C. M. Officer, junior. The defendant was the trustee in the insolvent estate of the said C. M. Officer. The insolvent was out of Victoria, and the trustee stated in his affidavit that he believed that there were other creditors of the estate, and that the plaintiff was in possession of the properties comprised in the mortgages, and further, that he did not know the value of the properties, nor how the plaintiff had conducted the management thereof. There was no statement that there was any preliminary question necessary to be tried, and the case is reported upon the point raised whether the Judge had power under Order XV. to make an order for accounts, including an order *nisi* for foreclosure.

W. H. Moule in support of the application—The provisions of Order XV., r. 1, give the Court power to make the order asked for. The rule contemplates an order for accounts "with all necessary inquiries and directions now usual in the Court in similar cases." The old practice in a foreclosure action directed similar accounts, and the decree was for foreclosure upon the accounts being taken and default being made in payment of the amount found due within a specified time. In this Court Hood, J., in the case of *Matthews v. Duffy* (a), made a similar order to that now asked for, though he expressed some doubt. Since that decision the practice has been uniform, though the point has never been contested by the defendants in such applications. In England the case of *Smith v. Davies* (b) decided that the

(a) [1892] 14 A.L.T. 90.

(b) [1885] 28 Ch. D. 650.

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Judge had jurisdiction to make such an order. Then, in the same year, in the case of *Blake v. Harvey* (c), Cotton, L.J., in argument said that he doubted whether an order for foreclosure could be made; but in the following year, in spite of this doubt, the Court of Appeal in *Smith v. Davies* (d) dismissed the appeal in that case, and therefore must have affirmed the jurisdiction. In *Dyott v. Neville* (e) a similar order was made by North, J., which was the subject matter of an appeal, but the appellate court refused to deal with the point, as it had not been raised by the defendant in the court below. In *Bissett v. Jones* (f), Chitty, J., in deference to the doubt raised in *Blake v. Harvey* said that he was not disposed to make these orders, but he intimated in the judgment that he might do so, and then leave it to the Court of Appeal to decide. In *Seton on Decrees* (4th ed.), p. 1035, this procedure is recognized. There are two authorities against the practice: *Lloyd v. Lloyd* (g) and *Clover v. Wilts, etc., Building Society* (h). The procedure hitherto adopted ensures less expense and a speedier judgment, and involves no injustice. In England the rules have been amended, and by Order LV., r. 5A, express provision is made to remove all doubts.

Mackey to oppose—The English practice has been expressly altered to meet this procedure, and that clearly indicates that the trend of authority was against such an order being made under Order XV. Cotton, L.J., in *Blake v. Harvey* expressly dissents from the procedure adopted in *Smith v. Davey*, and it appears that Chitty, J., felt bound by that expression of dissent: *Bissett v. Jones*. The words of the order indicate no intention to give the Judge jurisdiction to make a final decree or any order in the nature of a final decree. It refers to ordinary accounts and inquiries, not only by mortgagees, but in partnership and administration actions.

HODGES, J. This was an application made by a mortgagee under Order XV., r. 1, for accounts to be taken and the usual order *nisi* for foreclosure. It has been contended that this order

(c) [1885] 29 Ch. D. 827.

(d) [1886] W.N. 30.

(e) [1887] W.N. 35.

(f) [1886] 32 Ch. D. 635.

(g) [1878] 26 W.R. 572.

(h) [1884] 32 W.R. 895.

cannot be made under this rule. In *Smith v. Davies* (i), Chitty, J., made such an order under this rule, and expressed his opinion that there was no doubt that that was a proper order to make, although the very objection taken here was taken there; that case went to the Court of Appeal, and is reported only in the "Weekly Notes." The decision was affirmed by the Court of Appeal, so that as far as that case is concerned there is a decision of the appellate court in which this very objection was raised, and it is practically a decision of that court on this point. It is true that according to the abbreviated form of the report the point was not then discussed; still I cannot understand why it should not have been, as it was taken in the court below, and argued, and I presume it was brought forward again in the Court of Appeal, and if so there is a decision of that court on the very subject. In the same year 1885 the case of *Blake v. Harvey* (k) was argued; there the question was again raised, and in the course of argument, Cotton, L.J., expresses his doubt whether such an order could be made under that rule. There is nothing very definite upon that subject in the judgment of Cotton, L.J.; but in the case of *In re Gyhon* (l), while Lindley, L.J., concurs in the judgment, he says that he does not wish to restrict the operation of Order XV., r. 1, though in applying it, regard must be had to Order LV., r. 10. I see no reason either for limiting the operation of Order XV. It then appears that the matter came again before Chitty, J., in *Bissett v. Jones*, and that learned Judge seems to have doubted whether in face of the dissent of Cotton, L.J., he should make such an order under Order XV.; and with regard to the particular matter under consideration he says:—"With respect to that part of the motion which is under Order XV., I have already said that my present intention is not to act upon *Smith v. Davies*. It is, however, quite possible that in some similar application I may make an order under Order XV., with a view of having the question raised and settled in the Court of Appeal. To have taken such a course in the present case would not have been proper, seeing that no one appears for the defendant, and the case could not be

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(i) 28 Ch. D. 650.

(k) 29 Ch. D. 827

(l) [1885] 29 Ch. D. 834.

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argued." So that he there indicates that when a proper case arises he will affirm his former decision in *Smith v. Davies*, that it may be determined by the Court of Appeal. Then the case of *Dyott v. Neville (m)*, North, J., made a foreclosed order in an action for accounts under Order XV., and that case also went to the Court of Appeal, but the latter court did not decide that particular question, because it held that the Judge had jurisdiction to make the order, and as the defendant did not take the objection in the court below he would not be allowed to raise it in the Court of Appeal. However, that case intimates that North, J., had the same opinion as Chitty, J., that it was a proper order to make. So that the Court of Appeal has affirmed one order, and no Court of Appeal has even pronounced its opinion to the contrary effect. That decision too has been followed in our Court by Hood, J., in *Matthews v. Duffy*, and by other Judges, and I have myself made similar orders. Certainly, in those cases in this Court there never has been any opposition, but it has been the established practice and I see no reason to disturb it. There can be no further authority in the English courts, because, apparently in consequence of the doubt expressed by Cotton, L.J., a new rule has been passed—Order LV., r. 5A, which deals expressly with the very point. I shall therefore make the order as asked.

Solicitors for plaintiff: *Blake & Riggall.*

Solicitors for defendant: *Pavey, Wilson & Cohen.*

W. H. M.

(m) [1887] W.N. 35.

COCK v. THE STAWELL AMALGAMATED SCOTCHMAN'S AND CROSS REEFS QUARTZ MINING COMPANY NO LIABILITY.

1898
June 6,
July 19.

Mines Act 1890 (No. 1120), s. 49—Mining Leases—Application for lease on behalf of company—Holder of miner's right—Rights of Crown lessees—Right to test validity of lease.

Madden, C.J.

W., instructed by the legal manager of a mining company, sent in an application for a mining lease; the application form was signed by W., but the name of the company was set out in the form. The lease was issued to the company.

Held, that W. was the agent of the company to make the application on its behalf, and that the lease was rightly issued to the company.

The holder of a miner's right is not entitled by virtue of such right to register his claim over Crown lands held under a mining lease, notwithstanding the fact that such lease may be void or voidable as between the Crown and the lessee; nor can such holder of a miner's right test the validity of such lease in a summons for possession before a warden.

SPECIAL CASE stated for the opinion of the Supreme Court by the warden of goldfields at Stawell.

The complainant, C. M. Cock, as the holder of a miner's right summoned the defendant company, the Stawell Amalgamated Scotchman's and Cross Reefs Quartz Mining Company No Liability, to show cause why it should not be declared that he is entitled to take possession by virtue of his miner's right of certain Crown lands, and to have it declared that the lease No. 1174 held by the defendant company was void, and that the defendant company is in illegal possession of the said Crown lands. At the hearing before the warden certain evidence was given as to pegging out the claim upon the declaration of forfeiture in the *Government Gazette* in January 1898, but as the argument in this case was directed as to the granting of the lease No. 1174, and as to whether that was void or not, reference to other evidence has been omitted. It appeared that in 1889 one John Walker, acting under instructions from Capper, the manager of the Victoria and St. George United Gold Extracting Company No Liability, sent in an application for a lease; this application was exhibit F in the case, and was in the following form, omitting formal parts:—
"Date, 8th June 1889. . . . Application for Gold Mining Lease. . . . I, having duly deposited the sum of five pounds and a sum sufficient to cover the costs of survey as

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required by the regulations relating to gold mining leases, hereby in accordance with and subject to such regulations apply for a lease, the particulars of which are hereunder set forth, and I agree that such sum shall in all respects be held subject to and may be appropriated under the terms of such regulations, and that I will execute such lease upon the basis therein stated as the Governor shall think fit to grant. I have the honour to be JOHN WALKER."

Name in full of applicant or applicants and style under which it is intended that the business shall be carried on.	Full address of each applicant.	Extent of ground applied for.	If more than 30 acres the least that will be accepted.	Name of each person who, if any, is occupying the land applied for.	<i>The other headings are immaterial.</i>
John Walker The Victoria and St. George United Gold Extracting Company No Liability.	Stawell	20 acres more or less.		The applicant the Victoria and St. George United Gold Extracting Company No Liability. The Borough Council of Stawell claim certain rights, etc.	

A lease was granted upon that application to the Victoria and St. George United Gold Extracting Company No Liability. The manager of the company affixed the seal of the company to the lease without applying to the directors for permission, and it was not affixed in the presence of the directors, though the rules of the company make provision for this being done. The Victoria and St. George United Gold Extracting Company No Liability transferred all its assets, including the lease, to the defendant company. The defendant company now made application for a lease for the same lands, and the complainant thereupon, after certain pegging operations had been gone through, took out this summons.

The warden made the following findings, and reserved the following questions:—"I find, as a matter of fact, that one John Walker, under instructions from S. Capper, as legal manager of the Victoria and St. George Gold Extracting Company, put in an

application for lease, as per exhibit F, but not for himself; and I find that the lease granted on that application was not granted to the applicant Walker, and was not executed by the applicant Walker at all, nor within the sixty days as required by the regulations; and that the lease granted on the application was executed by the said S. Capper, purporting to act on behalf of the said Victoria and St. George United Gold Extracting Company No Liability, by applying the seal of the said company; no directors being present, nor did the said S. Capper apply to the directors for permission to execute the said lease (see rule 32 of the rules and regulations of the company). S. Capper, at the time of applying such seal, was in communication with the manager of the defendant company, and undertook to procure the execution of the lease and transfer to the defendant company upon being paid his expenses out of pocket not charging anything for his own labour. There is no evidence of date of issue other than the 28th January 1890. That the lease is dated 28th January 1890, and was executed on the 25th February 1890. That the Victoria and St. George United Gold Extracting Company No Liability sold its right under the lease in question to the defendant company, and that the said lease was transferred to the defendant company.

"I reserve the following questions for the opinion of this Honourable Court:—Was the said lease No. 1174 void or invalid *ab initio* on the following grounds, or any of them?—(a) Not granted to the applicant. (b) Not executed by the applicant at all. (c) Not executed by the applicant within sixty days as required by the regulations then in force. (d) Not executed by the grantee at all. (e) Not executed by the grantee with proper formality, the manager of the grantee company being at the time the agent of the defendant company. (f) Not executed by the grantee within sixty days as required by the regulations then in force."

The regulations were not put in evidence and were not part of the special case.

O'Hara Wood for the complainant—The defendant company held under a lease which was void from its inception. Walker,

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under instructions from the legal manager of the Victoria and St. George United Gold Extracting Company, put in an application for a lease in the form in exhibit F. Walker was therefore the applicant, but the lease is granted to the company, and it is void because it was not granted to the applicant. It is Walker who undertakes to comply with all the regulations and covenants, and there is no power to grant a lease to one person on behalf of another. The lease was never executed by the applicant, Walker, and therefore it is of no avail. By the regulations, the lease has to be executed within 60 days, and this was not done.

[*Cussen*—There is no proof of the regulations in this case at all.]

The regulations are incorporated in the Act, and the Court will take judicial notice of them.

[MADDEN, C.J. That question must depend upon the evidence in this special case, and if the regulations do not form part of the case I cannot deal with it.]

It was decided in the case of *The Aladdin Gold Mining Company v. The Aladdin and Try Again United Gold Mining Company* (a) that there is no power to grant a lease of auriferous land to anyone but the applicant. The lease must be executed within the time prescribed: *Wissing v. Finegan* (b); that case was followed in *Forrester v. Great Western Long Tunnel Gold Mining Company* (c). If the lease was never in existence it could not be forfeited, and the land would be unoccupied Crown land, and the complainant had a right to come and get his claim registered. Then there is another ground of objection, that the seal of the company was never properly affixed; it was affixed by the company's manager after the property had passed.

Cussen for the defendant company—Upon the facts of this case there is nothing which precluded the Governor granting a lease, and, as an innocent third party, the defendant should not be affected by any informality. The application form shows

(a) [1869] 6 W.W. & A'B. (E.) 266. (b) [1872] 3 A.J.R. 126.

(c) [1887] 13 V.L.R. 381.

distinctly that Walker was making the application for the company described in the form. The decision in *Forrester's Case* is practically in favour of the defendant. The ground of the judgment was merely that the new manager of the company had not signed the deed within 60 days. Since those cases the Privy Council have decided in *Osborne v. Morgan* (d) that the lease is voidable, not void, and that it is for the Crown to interfere, and not for a mere stranger to set up these informalities. There is nothing in the Act which prevents a person applying as an agent for another for a lease. Walker was never recognized by the Crown as the applicant. As to the improper affixing of the seal, third parties are not to be prejudiced by the irregularity of the management of a company: *Mahony v. East Holyford Mining Company* (e).

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Cur. adv. vult.

MADDEN, C.J. This was a case stated by the Warden of the Court of Mines at Stawell. It appears that one Cock applied for and by virtue of a miner's right pegged out certain land, and applied for an order of possession of such land from the Warden's Court. The defendants are a company who purchased from another company its lease, and by that lease the part of the land the plaintiff pegged out was covered. It was contended, on behalf of the complainant, that the lease to the Victoria and St. George United Gold Extracting Company was a nullity, inasmuch as it was issued in contravention of law, and that he was entitled to treat it as such in virtue of his miner's right. The lease in question was originally applied for by one Walker, who was directed by the legal manager of the Victoria and St. George United Gold Extracting Company to apply for it on their behalf. Walker accordingly made application, and the lease was issued—not in Walker's name, but to the company. That is one of the material circumstances to be dealt with in this case. It has also been said that by the provisions of some regulations made by the Government, a lease, to be valid, must be executed by the applicant. It was also contended that if the

(d) [1888] 13 Ap. Ca. 227.

(e) [1875] L.R. 7 H.L. 869.

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lease was not executed within sixty days then the deed of lease was void. It was contended before me at the hearing that the regulations were in evidence before the Warden. The Warden has informed the Court that they were not. In the case stated the Warden has made certain findings. (His Honor read the findings as set out in the special case.)

All the objections, except the first (that the lease should have been to Walker), come to this—that the lease was not executed either by the company or by Walker within the time prescribed. As the regulations were not in evidence no objections could be raised on them in order to allow the Warden to determine a case on them. But a more satisfactory ground for me to proceed upon is to assume that the regulations were in evidence, and were the same as those dealt with in the case of *The Aladdin Gold Mining Company v. Aladdin and Try Again United Gold Mining Company* (f), and then I am of opinion that still none of the objections are sound.

In that case it was held that the lease was void because it was not granted to the applicant. There the circumstances were different. There was a man named Wekey with two friends already in possession of the land. Then Wekey made application for a lease for himself and friends in contemplation of the formation of a company. At that time Wekey had no idea of anything like fraud on the part of any other persons, but afterwards his suspicions were aroused, and he thought a swindle was going to be worked by those representing the company, and he ultimately withdrew his application. Then other persons made application for a lease to the company, and that lease was issued. In that case it was held that the lease was void, and of course it was so held, for then the land was Wekey's; he had applied for a lease and had never shown an intention to abandon, and there was something in the nature of a fraud established. But in the present case Walker himself sets up no right to the land in question, he is merely nominated by the company to make application, and as a matter of fact the lease is issued to the Victoria and St. George Gold Extracting Company. A company cannot apply by itself.

(f) 6 W. W. & A'B. (Eq.) 266.

it must do so by someone on its behalf. It would be going altogether too far to say in a case like this that a company cannot make application by its agent. There is nothing at all improper or illegal in such an application, and accordingly in the present case, whether the regulations I have alluded to are to be considered as before the Warden or not, the case of the Aladdin Company does not apply in the circumstances now before me for consideration.

It has been further urged on behalf of the complainant that whoever is the grantee of this lease—Walker or the company—the lease is of no effect, because it was not executed within the 60 days prescribed. In the case of *Wissing v. Finegan* (g) Molesworth, J., expressed some misgiving upon the question as to the holder of a miner's right having any right to claim leased land as against the holder of a voidable lease from the Crown before it has been avoided by the Crown. The learned Judge says:—"It is doubtful whether the acceptance of leased estate, without execution by the lessee, makes him liable in covenant. I have not had so much difficulty as to the right of the Crown to get rid of the lessee as to that of the holder of a miner's right to claim as on a forfeiture before the *Gazette* publication of sec. 30. Sec. 30 does not say directly that no land a lease of which shall have been executed shall be occupied under miners' rights, in which case I might hold it operative under sec. 14 of Act No. 291, and I do not think its permissive words create a prohibition by implication for cases not coming within them. I answer that the Warden has authority to question the power of His Excellency the Governor to allow execution by a lessee making a lease effectual after the expiration of the 60 days: that the Warden has power to declare the lease void." There the learned Judge, although he did so with doubt, decides as is contended for by the applicant in the present case. Molesworth, J., here foreshadowed an objection to which effect has since been given by a decision of the Privy Council. In the case of *Forrester v. Great Western Long Tunnel Gold Mining Company*, Webb, J., followed *Wissing v. Finegan* to

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a certain extent, but it was not necessary for him to do so fully. Since then there has been the decision of the Privy Council in the case of *Osborne v. Morgan* (h). There it appears : "In an action by the holders of 'miners' rights' issued to them under the *Goldfields Act* 1874, and regulations made thereunder, to set aside the defendants' mining leases, also thereunder granted, on the grounds :—(1.) That they had been granted contrary to sec. 11 within two years from the proclamation of the goldfields within which the leased areas were contained. (2.) That the formalities prescribed by the regulations had not been observed by the defendants when applying therefor. *Held*, that neither under the Act nor otherwise had the plaintiffs any right to interfere with the lessees' possession. Sec. 9 gave them no rights whatever as against lands let by the Crown, and no title to try the validity of Crown leases relating thereto ; and the whole tenor of the regulations is opposed to such a contention."

That case was decided upon a Queensland statute, but I have examined that statute, and find that, although its arrangement is different from our own Act, its purport and subject matter are the same—in fact, it is obvious that the Queensland Act was intended to be a reproduction of our legislation on the subject and therefore the view taken by the Privy Council should prevail in this case, that although there may be an objection which the Crown could take as against the lessee, that objection is not open to any casual holder of a miner's right to enable him to wipe out a lease given by the Crown to a lessee of Crown land. The convenience of this view is easily seen. It would be very strange if after the Crown had granted a lease, and had come under certain obligations to the lessee, and the lessee on his part had also made himself liable on obligations to the Crown, that then any third person holding a miner's right could set aside the lease because of any irregularity.

I answer, then, that this lease is not void. First, because the regulations were not in evidence, and all the objections were based upon them ; and next, that if the regulations had been in evidence, and if all the circumstances were the same as in the *Aladdin Case*, that still there was nothing in this case to prevent

(h) 13 App. Ca. 227.

Walker applying in the capacity of agent for the company, and in addition to that the decision of the Privy Council applies, and that if all the objections taken are well open to the Crown as against the holder of a lease from the Crown they are still not available against the Crown to the holder of a miner's right, the position of the complainant in this case.

Solicitors for complainant: *Smart & Walker.*

Solicitors for defendant: *Godfrey & Godfrey.*

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[PRACTICE COURT.]

MAYOR, ETC., OF BENDIGO v. CRAVEN, EX PARTE THE VICTORIAN RAILWAYS COMMISSIONER.

1898
 August 9.
 ———
 Hodges, J.

Prohibition—Delay in making application.

In December 1897 a municipal council obtained judgment against A, an *employé* in the Railway Department. On 1st April 1898 the complainant obtained an order *nisi*, attaching moneys due to A (in the hands of the Railways Commissioner). This was duly served on the same day, and was made absolute by the Court of Petty Sessions at Bendigo on 7th April, the Commissioner not appearing. Upon the 26th July the Commissioner obtained an order *nisi* to prohibit the enforcement of this order attaching such debt on the ground that the justices had no jurisdiction, inasmuch as the Commissioner was not resident within the local jurisdiction of that court. No excuse was furnished explaining the reason of the delay in taking out the order for prohibition, and upon the objection being taken on the return of the order *nisi*,

Held, that the applicant having been guilty of delay the Court should refuse to interpose, and the order *nisi* for prohibition should be discharged.

THIS was an order *nisi* for a writ of prohibition on behalf of the Victorian Railways Commissioner, calling upon the Mayor, etc., of Bendigo to show cause why certain garnishee proceedings should not be prohibited from being enforced. It appeared that the City Council of Bendigo had recovered judgment against one Craven, a railway *employé*, in December 1897. On the 1st April 1898 the Council obtained an order *nisi*, attaching debts due from the Commissioner of Railways to Craven. This order *nisi* was served on the garnishee on the same day, and was made absolute on 7th April, there being no appearance for the garnishee. The Commissioner took out the present rule *nisi* on the 26th July. The ground upon which the rule had been

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granted was that the justices of Bendigo had no jurisdiction to make the garnishee order absolute, as the garnishee was not resident within that district. An affidavit had been sworn by the town clerk of Bendigo upon the hearing of the application for the attachment of the debt, in which it was stated that the Victorian Railways Commissioner was resident at Bendigo, within the jurisdiction.

Bryant to move the order absolute.

Deakin to show cause—There is an objection to this application which tends to show that it should not be entertained. The applicant has been guilty of several months' delay. He has furnished no excuse for such delay, and the Court, in its discretion, should now refuse to interpose: *Mayor, etc., of London v. Cox (a)*. That case was followed in *Broad v. Jenkins (b)*.

Bryant—The judgment creditor has not had its position altered by the delay, and the Court should not now refuse to deal with the application upon its merits. The objection to jurisdiction is one appearing on the face of the proceedings, because the municipal council must be taken to know that the Commissioner does not reside within the local jurisdiction of the Court at Bendigo. The applicant was not called upon to take any steps until a demand in the action of execution was threatened.

HODGES, J. In this case, on the 1st April 1898 an order *nisi* was made by the Court of Petty Sessions at Bendigo for the attachment of debts accruing due from the Victorian Railways Commissioner, and that order was on the same day duly served. On the 7th April that order was made absolute. On the 26th July the Railways Commissioner applied to have that order set aside, but before he made that application execution had been threatened. It is contended on his behalf that the justices had no jurisdiction to make that order attaching the debt. The question here is whether I should make the order for prohibition absolute or not. The prohibi-

(a) [1886] L.R. 2 H.L. 239.

(b) [1888] 21 Q.B.D. 533.

tion sought for is not the statutory prohibition, because the time for taking advantage of the statute has passed, but it is said that as there was no jurisdiction to make the order the common law prohibition remains. The common law prohibition is one of those extraordinary remedies which, although one of right, is not one granted as of course, the Court having a discretion as to whether or not it will grant it. I do not mean to say that the Court has a discretion to do what it pleases and to refuse the order or not as it pleases without reason. It gives the Court jurisdiction to say whether, under the circumstances, the interests of justice will be served by the issue or refusal of the writ. In the case of *Mayor, etc., of London v. Cox* (c), Willis, J., said:—"If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence: *Roberts v. Humby* (d). If it be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior court the facts ousting the jurisdiction, and such Court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a superior court that it was erroneous, obtain a prohibition: *Thompson v. Ingham* (e), followed in *Chew v. Holroyd* (f) and *Marsden v. Wardle* (g). Where, however, the defect is not apparent and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction—*Knowles v. Holden* (h)—yet considering the conduct of the applicant, the importance of making an end of litigation, and that the writ though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for delay, such as disability,

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(c) [1886] L.R. 2 H.L. 239, p. 282.

(d) [1837] 3 M. & W. 120.

(e) [1850] 14 Q.B. 710.

(f) [1852] 8 Ex. 249.

(g) [1854] 3 E. & B. 695.

(h) [1853] 22 L.J. Ex. 223.

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malpractice, or matter newly come to the knowledge of the applicant. . . .” Now, in this case the error of the excess of jurisdiction does not appear on the face of these proceedings; it depends upon the fact that the Commissioner or corporation does not reside within the local jurisdiction of the particular Court of Petty Sessions which had to determine the question. It depends upon a fact which was within the knowledge of the applicant for this writ, and he has thought proper, without excuse, to allow the Court to proceed to judgment without setting up the objection. He not only did not raise it, but he did not take the trouble to appear at the hearing, but allowed judgment to go by default, as if the proceedings were all right, and admitting that the money was due from him to the judgment debtor. I shall therefore, for this reason, discharge the order. (His Honor then dealt with the facts set out in the affidavits of the town clerk, which had been filed in support of the garnishee proceedings, and in consequence of the statements therein being calculated to mislead the Court of Petty Sessions as to the point of jurisdiction, refused to allow costs.)

Order discharged, without costs.

Solicitors for Mayor, etc., of Bendigo: *Hyett & Quick.*

Solicitor for applicant: *Guinness, Crown Solicitor.*

W. H. M.

1898

August 10.

Hodges, J.

[PRACTICE COURT.]

FORBES v. NEWBOULD.

Justices—Order in petty sessions—Conviction—Reserved decision—Justices Act 1890, s. 77 (14).

An order of justices in petty sessions convicting a defendant is not bad by reason of the fact that at the time the justices heard the evidence they had reserved their decision in another case involving the same subject matter.

Hamilton v. Walker ([1892] 2 Q.B. 25) distinguished.

ORDER TO REVIEW.

Arthur Newbould, a dairyman carrying on business in South Melbourne, was prosecuted at the Court of Petty Sessions, South Melbourne, on 13th July 1898, under the provisions of sec. 43 of the *Health Act* 1890, for selling adulterated milk.

The information was laid by Alexander Pettigrew Forbes, an inspector of the municipality of South Melbourne. Before the charge against Newbould was heard, an information by Forbes against one Lorimer, a driver in the employ of Newbould, for a similar offence, was heard. When the evidence in the latter case had been taken and the case was closed the justices reserved their decision, and intimated that they would hear Newbould's case. At the close of the evidence and during the address of defendant's solicitor, the informant's solicitor stated to the Court that he would withdraw the charge against Lorimer; that the reason proceedings were taken against him was that it was thought that there was evidence of the ownership of the cart which Lorimer was driving at the time of the sale. The Court made an order fining Newbould 2*l.*, with 3*l.* 3*s.* costs.

An order *nisi* to review this decision was obtained by defendant upon the ground that "the justices were wrong in hearing an information against the defendant for an alleged similar offence without first adjudicating upon that laid in the case of *Forbes v. Lorimer*."

Larkin to move the order absolute.

Isaac A. Isaacs (A.G.) (*Schutt* with him) to show cause—Under the *Health Act*, sec. 43, both master and servant were liable. The justices merely deferred their decision in the first case. *Reidy v. Herry* (a) is distinguishable. Here the reservation of the decision upon the first case could not affect the second case, because the second defendant was convicted, not the first.

(Counsel was stopped.)

Larkin in reply—Some of the evidence in the first case might have affected the decision in the second case. Justices should give their decision or retire to consider it: *Justices Act* 1890, sec. 77 (14).

Counsel referred to *Reidy v. Herry* (a), *Hamilton v. Walker* (b).

(a) [1898] 23 V.L.R. 508.
V.L.R., Vol. XXIV.

(b) [1892] 2 Q.B. 25.

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Isaacs—In *Hamilton v. Walker* the defendant was charged under two separate informations upon the same facts.

Counsel referred to *Reg. v. Fry (c)*.

HODGES, J. This is an application to review a conviction made under sec. 43 of the *Health Act* 1898 against Arthur Newbould, at the Court of Petty Sessions, South Melbourne, on 13th July 1898. The ground of objection is that there had been before the justices upon the morning of the hearing a similar charge against one Lorimer lodged by the same informant, and that that charge had been heard, but not disposed of, at the time that the charge against Newbould was heard. Now it would, in my opinion, be a most extraordinary state of the law if any decision of justices was to be held bad because they had at the time they gave it some case which they had not disposed of—if the mere fact that they were taking time to consider some case made all subsequent decisions bad. It would also, in my opinion, be a curious state of things if, when they had reserved their decision in one case, the decision of a subsequent case was to be held bad because it involved similar questions or was concerned with similar subject matter. So far as I am aware there is no authority for the suggestion that the justices' decision is bad because they had, at the time they heard the evidence, reserved their decision in some other case in respect of similar subject matter. It is of the highest importance that justices should, when giving their decision, consider the evidence in the case before them, and that evidence alone—that they should not be influenced by evidence given in any other case. To be so influenced would be against the first principles of justice; they should not consider or deal with any evidence given which any party in the case had a right to object to. If such evidence is considered and weighed by them, then their decision would very properly be set aside. That was not done here; but the evidence is to the effect that the justices proceeded to hear the second case before deciding the first. The principal case relied upon by the defendant's counsel is *Hamilton v. Walker (d)*. In that case the justices made two convictions against the same individual.

(c) [1898] 14 *Times* L.R. 445.

(d) [1892] 2 Q.B. 25.

At the same time they made no conviction in the first case until they had heard the second. Now, in the first place, that was not a question of reserving a decision against one person while a case against another was being heard; but it was one of reserving a case against a man before hearing another against him. I am not satisfied that in all cases that would be a fatal objection. In the case to which I have just referred what made the objection fatal was that facts which would prove one case would prove the other, and a man might have two convictions recorded against him where he ought only to have one, because facts which could prove one case might also be thought to prove the other. If the first case had been heard and determined, he would have been able to plead in the second case *autrefois acquit* or *autrefois convict*. Under these circumstances the Court held both convictions bad. They were simultaneous convictions against the same person upon similar charges, which might be proved upon the same facts. Without for one moment expressing any opinion at variance with that decision, it is, I think, a case entirely different from the present case. There was nothing wrong in the decision here. The justices reserved their decision, not in order to hear evidence against another defendant, but until a convenient time. If the objection here had been taken on behalf of the person first charged, the matter might have presented a different aspect. It might there have been said that the justices reserved their decision upon the first charge until they had heard the charge against the second defendant, and were influenced by the evidence given in the second case. But what difference could it make to the defendant Newbould whether the justices convicted or acquitted Lorimer first before they heard his case? Certainly they were bound to deal with one case before another, and so long as they acquitted Lorimer it did not affect the case against Newbould. I think this order should be discharged, with costs.

Order discharged.

Solicitors for informant: *Gillott, Bates & Moir.*

Solicitor for defendant: *Nolan.*

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F.C.
1898
June 21.

POLA (EXECUTRIX, ETC.) v. THE VICTORIAN RAILWAYS COMMISSIONER.

Limitation of action—Negligence—Death of injured person—Action by representative—“ Act complained of ”—Railways Act 1890 (No. 1135), s. 119—Wrongs Act 1890 (No. 1160), s. 16.

Sec. 119 of the *Railways Act 1890* applies to actions brought against the Victorian Railways Commissioner by the representative of a deceased person for injury to such person, causing his death.

Sec. 119 of the *Railways Act 1890* does not repeal by implication sec. 16 of the *Wrongs Act 1890* with respect to the time within which such an action must be commenced; but both sections will be given effect to, so that such an action must be commenced within six months from the death of the injured person.

The words in sec. 119—“ act complained of ”—may refer to two different classes of events—(1) to the mere injury of the person himself; and (2) to the injured person's death.

APPEAL from the County Court at Ararat.

Harriet Pola, the executrix of John Pola, deceased, brought an action against the Victorian Railways Commissioner, in which she claimed 500*l.* damages for that by reason of the negligence of the defendant or his servants the deceased, John Pola, was, on the 6th March 1897, run over and killed by one of the defendant's trains. Notice of action, in accordance with sec. 119 of the *Railways Act 1890*, had not been served upon the defendant. The action was not commenced within six months of the date of injury or of the injured person's death. The trial took place at Ararat on the 19th April 1898. Preliminary objection to the action was there taken by defendant's counsel, that sec. 119 of the *Railways Act 1890* had not been complied with in respect of the notice of action and as to the time within which the action should have been commenced. The learned County Court Judge directed the jury to find a verdict for the defendant. From this verdict the plaintiff appealed by way of motion under sec. 134 of the *County Court Act 1890*.

W. H. Williams for the plaintiff to move.

Cussen to show cause—The provisions of sec. 119 of the *Railways Act 1890* apply: *Luplau v. Victorian Railways Commissioners* (a); *Ewart v. Victorian Railways Commissioner* (b).

(a) [1886] 12 V.L.R. 18.

(b) [1896] 18 A.L.T. 61.

[WILLIAMS, J. The sole argument in the latter case was whether six months' notice was sufficient.]

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Joliffe v. Wallasey Local Board (c) is in my favour. By sec. 62 of the *Railways Act* 1890 the *Lands Compensation Act* 1890 is incorporated in and to be read as part of the former Act. In the latter Act there is an express power to run engines and trucks. The defendants were running this engine and trucks in pursuance of the *Railways Act*. The *Railways Act* was passed at a later period than the *Wrongs Act*, and the words are perfectly general. The right of action given to an executor or administrator, though differing from that given to a person himself had he lived, is in all material particulars the same right of action: *Read v. Great Eastern Railway Company* (d). If it was not so the result would be that the *Railways Act* would be continuously applicable to the injured person's case had he lived for six months after the injury, but if he died at the end of five months his representative would then have a year's time in which to bring an action. On the other hand, the injured man might live three or four months after the injury and then die; in such a case his executor would not have much time left within which to give notice. But this hardship is answered by the fact that the sufferer himself may bring an action. The cause of action is the same, though the damages given may differ: *Griffiths v. Earl of Dudley* (e). The object of notice under the *Railways Act* is twofold—(1) to enable the Department to collect evidence promptly; (2) to enable it to tender amends. The latter reason applies as much to the case where a man is killed as to where he is merely injured. There is no difficulty in reading the two Acts together.

Williams in reply—The construction which the defendant seeks to put upon the *Railways Act* is that everything done by the defendant is under the Act. The actual running of a train is something not done under the Act. The matter of reward to the department is to be considered. The fact that rails were

(c) [1873] L.R. 9 C.P. 62, at pp. 86, (d) [1868] L.R. 3 Q.B. 555.

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(e) [1862] 9 Q.B.D. 357.

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put down and an engine run upon them is doing something purporting to be done under the Act. The Legislature's intention is not that everything done by the Railway Department is under the provisions of the *Railways Act*. This is an action brought under the *Wrongs Act*. Under that Act the plaintiff has twelve months' time within which to bring it. An executor or administrator has no cause of action until the injured person dies. If the injured person does not die until five months after, the cause of action is gone. The *Wrongs Act* is an enabling Act, and authorizes the bringing of an action outside the common law action contemplated by the *Railways Act*.

[WILLIAMS, J. The injured man himself may by dying lose his cause of action; but his death may give his executor a right of action he did not himself possess. The executor gets a right of action, under Lord Campbell's Act, the moment his testator dies. If your contention is correct, an executor may maintain an action in respect of an injury to the deceased for which the deceased himself, if he had lived, could not have brought an action; for example, if he died seven months after the injury and had given no notice of action.]

MADDEN, C.J., delivered the judgment of the Court [MADDEN C.J., and WILLIAMS and HOOD, JJ.] In this case two points have been raised—(1.) That no notice of action was necessary or required by sec. 119 of the *Railways Act* 1890, and it was unnecessary for plaintiff to bring her action within six months after the act complained of was committed. (2.) That the action was brought under the *Wrongs Act* 1890, and sec. 119 of the *Railways Act* 1890 does not apply to it. We think that the *Railways Act* does apply to an action of this character, because the Act of Parliament is an enactment which authorizes the Railways Commissioner to place a railway across the highway, and to run trains upon the rails so laid, otherwise the object of building a railway would be useless. Under this power he runs over a man, or, at any rate, he is alleged to have done so. That is to say, the Railways Commissioner in running his train acts under Part II. of the *Railways Act*. But, notwithstanding this power given by the Act, negligence arises on the part of

the Commissioner or his servants, and consequently it is an act coming under the provisions of sec. 119.

Then it is said that if this is an action brought under the provisions of the *Wrongs Act* by the representative of an injured man who died by reason of his injuries, it is an action which forms an exception to the provisions of sec. 119 of the *Railways Act* 1890; in other words, that the existence of the *Wrongs Act* which gives this special form of action by reason of a fatal injury caused to a relative creates an exceptional cause of action which requires no notice of action to be given, as do all other actions against the Railways Commissioner. The *Statute of Wrongs* was in force when the *Railways Act* was passed. Sec. 119 of the latter Act provides that "All actions to be brought against the Commissioners or against any person for anything done or purporting to have been done under Parts I. and II. of this Act shall be commenced within six months after the act complained of was committed and no writ shall be sued out against nor any copy of any process served upon the Commissioners or against any person for anything done or purporting to have been done by them or him under Parts I. and II. of this Act until notice in writing of such intended writ or process has been delivered to them or him. . . ." It will be seen that most comprehensive words are used. The negative words, also, "no writ," etc., are used. The words of the section are absolutely comprehensive, and therefore include actions under the *Wrongs Act*.

So that at first sight it would seem as if the effect of sec. 119 was practically to repeal the *Wrongs Act* to the extent that the time for bringing an action is altered to six months. But we think that such a repeal by implication, against which the Court always leans, would in some cases, if allowed, have the effect of depriving the representative of a deceased person of his right of action altogether—that is to say, if the injured person lingered for six months no action could be brought by the representative. It is extremely improbable that this state of things could have been the intention of the Legislature when passing the later Act. Therefore, we must endeavour to find a reasonable interpretation of sec. 119 of the *Railways Act* 1890

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which will not repeal by implication sec. 16 of the *Wrongs Act* 1890. We think that such an interpretation is to be found in these words—"all actions shall be commenced within six months after *the act complained of* was committed." It appears to us that these words may refer to two different classes of events—viz., first of all to the mere injury of the person himself, this being the act in respect of which he himself could complain at once. If, however, he brings no action and he dies, then his personal representative becomes entitled to bring an action in respect of the same thing, but only if the injury be followed by the death of the person injured. This appears to us to be a reasonable interpretation of the Acts, and although it does in effect strain to some extent the ordinary and usual meaning of the language used by the Legislature, it leaves the *Wrongs Act* intact and gives effect to sec. 119 of the *Railways Act*. So that if an injured man lingered for six months and then died his representatives would only be left six months from that time instead of twelve within which to give a notice of action. The reading of the Acts is a very different one indeed from the interpretation contended for by Mr. Cussen, that the *Wrongs Act* was repealed as to the six months, so as to deprive entirely of all right of action the personal representative of an injured man who lingered for six months without giving notice of action.

For these reasons we think this rule *nisi* should be discharged with costs.

Solicitors for plaintiff: *Maloney & Stuart* (for *Gran Ararat*).

Solicitors for defendant: *Guinness*, Crown Solicitor.

R. H. C.

[PROBATE JURISDICTION.]

IN THE ESTATE OF KENNEDY.

Administration and Probate Act 1890 (No. 1060), s. 17—Administration—Surety—Bond—Assignment—Discretion of Court.

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February 24.
A'Beckett, J.

The Court may in the exercise of its discretion refuse to order the assignment of an administration bond where the object of the applicant in seeking the assignment is merely for the purpose of heaping up costs.

APPEAL from a judgment of A'Beckett, J., refusing to order the assignment of an administration bond.

On the 4th August 1882 Johanna Kennedy obtained letters of administration to the estate of her late husband, John Kennedy. The estate consisted of 112 acres of land situate near Ballan, and was sworn not to exceed in value the sum of 252*l*. John Kennedy (now deceased) and Thomas Kennedy, the sons of the intestate, became sureties for the due administration of the estate. The intestate left seven children, including Andrew Kennedy, the applicant. Johanna Kennedy sold the land at Ballan in 1884 for 566*l*. 17*s*. This sum it was alleged she used for her own purposes, and did not distribute among the parties entitled thereto. On 14th July 1895 Johanna Kennedy died. By her will, dated the 22nd October 1892, she devised her estate, which consisted of 133 acres of land at Ballan, valued at 199*l*. 10*s*., to Thomas Kennedy and Margaret Egan, two of her children by the intestate John Kennedy, to whom the executors of the will of Johanna Kennedy, Thomas Lloyd and Thomas Moylan, afterwards conveyed it. On 30th June 1896, Andrew Kennedy obtained a grant of letters of administration *de bonis non* to the estate of his father, John Kennedy. It was alleged by Andrew Kennedy that prior to his father's death the latter owed him 120*l*., and had promised to provide by will for payment of this amount. Andrew Kennedy also stated that he had, shortly after his father's death, seen a letter in which mention was made of a will. He said that he believed that the 133 acres at Ballan formed part of his father's estate, and that his mother was receiving the rents from it. He also stated that he did not hear of the sale of the 112 acres at Ballan until 1887. In 1890 he wrote his mother asking a settlement of the debt owing

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by his late father, and for his interest in the estate, but received no reply. In 1895 Andrew Kennedy consulted his present solicitors with reference to the alleged will, and certain inquiries were made by them about it, with no result. John Kennedy, one of the sureties, died on the 6th September 1896, intestate, and letters of administration of his estate were granted on 31st October 1896 to his widow, Margaret Kennedy. Andrew Kennedy now sought to obtain an assignment of the bond given by Thomas Kennedy and Margaret Kennedy.

After the institution of the proceedings, Thomas Kennedy, without admitting liability, offered to pay out of his own moneys the sum of 24*l.* to the applicant in settlement of the matter, stating that the amount of the bond was 252*l.*, that the mother's third amounted to 84*l.*, leaving 168*l.* to be divided into seven parts of 24*l.* each. All the other persons interested in the estate of John Kennedy had, after the proceedings commenced, executed an instrument releasing Thomas Kennedy from all claims under the administration bond.

The motion came on for hearing before A'Beckett, J., on the 24th February 1898.

Irvine to move.

Dr. McInerney for Thomas Kennedy to oppose.

A. Skinner for Margaret Kennedy to oppose.

A'BECKETT, J. I think I have abundant material upon which I may exercise my discretion so as to refuse the application. No mere delay may debar the applicant; but if he is a party to an arrangement under which he and others refrain from exercising their rights, he is debarred. I believe there was an understanding that the mother should receive this money. The transaction occurred years ago, and this man has known for years what was being done, but he only now takes action. I think there was such a family understanding (although not put into so many words in a deed or anything of that character), to which this man was a party, and that he perfectly understood it all. That is one element to guide me.

Another is that the solicitors acting for him have made no

answer to a reasonable proposition, but have made a demand for costs to which they were not entitled. He took out an administration which could serve no purpose. There was a reasonable offer made and refused, and a preposterous demand made for costs.

Another reason which gives substance to my view—there has also been an intention on his part to set up a will—that the very administration he now seeks to take advantage of, and the liabilities under it, should never have been granted at all; and if that is the case, the will of his father ought to be proved. This is a bar against him; it shows the position he had taken up, that he has a perverted view of what his rights are, and his condition of mind is such as to make the Court doubtful about entrusting him with the bond. I recognize the principle that the Court cannot do as it pleases, but as a Court of Equity would allow; but I think these reasons are sufficient, and that I am saving this person—this deluded person—from further costs by refusing the application.

From this judgment the applicant appealed.

Irvine for the appellant—It is not the hardship or the unfairness of the claim which is made that affords an answer to the application. The answer must be a legal answer. In the case of *In re Steele* (a) the applicant had no means. That is not so here. It is not suggested that we are unable to pay the costs. In *In re Dean* (b), referred to by A'Beckett, J., in *Steele's Case*, it was held that the mere fact that an account was not filed will not give the right.

[WILLIAMS, J. The main question there was that if the applicant proceeded the action would have failed.]

A Judge ought not to entertain or consider the question of evidence. He should not make up his mind as to the party who would win.

[MADDEN, C.J. A'Beckett, J., in *In re Steele* took another equitable view. There was, in that case, an equitable arrange-

(a) [1897] 23 V.L.R. 146.

(b) [1895] 11 V.L.R. 764.

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ment between the parties beneficially interested to allow the mother to take the property, and not to interfere.

HOOD, J. How does the applicant explain the long delay ?]

He thought his father had made a will. This question was not considered in the Court below.

[WILLIAMS, J. As I understand your contention, it is that the agreement is in issue in the action, and therefore the Judge who hears the motion to assign has no right to go into the matter unless the facts are admitted, otherwise he determines the issue to be tried in the action.]

That point was settled in *In re Gleeson* (c). A good *prima facie* case is sufficient. Here there is an absolute breach of trust going to the whole estate.

[WILLIAMS, J. The learned Judge below evidently thought the action was only for the purpose of costs.]

We have a distinct legal right created for the purpose where an administration suit will fail. The discretion of the learned Judge is distinctly limited by the authorities.

[MADDEN, C.J. If the appellant took the £24 offered, would the Judge have a discretion ?]

A. Skinner for the respondent Margaret Kennedy, and

Dr. McInerney for the respondent Thomas Kennedy, were not called upon.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., WILLIAMS and HOOD, JJ.] We think that in this case the view taken by A'Beckett, J., in the Court below was certainly not a wrong one. As has been suggested, a bond of this kind is of such a nature that when a Judge is asked to assign it he has some measure of discretion which he may exercise. The right to have the bond assigned is not absolute in the person who applies. In the case of *In re Steels* certain exceptional circumstances existed which warranted the Judge in his refusal to assign, but in that case the principle was laid down that a Judge is not to refuse assignment merely out of a feeling of sympathy with the bondsmen or upon the ground that an action upon the

bond is not likely to prove successful. We cannot, however, for a moment admit that a Judge is bound upon legal and equitable grounds to grant an application of this character when he really is satisfied that the true object of the applicant in seeking an assignment is to use it oppressively and in an unmeritorious way and in order to heap up costs. It seems to us monstrous that a Judge should be forced to let loose this instrument of oppression in every case where a breach of trust has been committed. The Legislature never intended that a bond should be so acquired and authorized to be assigned. We think that it would be matter of great regret if a Judge did not, having that discretion, act within it. We do not think this case at all conflicts with *In re Steele*. Where the law is sought to be put in motion merely for the purpose of manufacturing costs, or for oppression, and particularly, as in this case, where the person interested was offered more than he could recover in the action, the Judge may very properly refuse to assign. Here the facts are that everyone other than the applicant was perfectly contented with matters as they stood, but the applicant demanded that the administration bond should be put in suit. He was then offered 24*l.*, the only amount he can possibly be entitled to. This he refused, stating that he wanted his costs. Being asked what costs, he gave no further reply. Such facts showed a desire on the part of the person attacked to give him whatever he was entitled to and also his costs, although his right to anything was not conceded.

We think these facts are sufficient to warrant the learned Judge in dismissing the application. We dismiss the appeal with costs, but without prejudice to any other application the applicant may think fit to make. There will be only one set of costs allowed the respondents.

Appeal dismissed with costs.

Solicitors for the applicant (appellant): *Lamrock, Brown & Hall.*

Solicitor for the respondent Margaret Kennedy: *G. L. Skinner.*

Solicitors for the respondent Thomas Kennedy: *McInerney & McInerney.*

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OF
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Madden, C.J.

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July 22,
August 8.

[IN CHAMBERS.]

CURNOW v. PIKE.

Holroyd, J.

Practice—Taxation of costs—County Court appeal—Rehearing—Scale of costs—Discretion of taxing master—Counsel's fee—Partner—Certificate of Associate—Amendment.

Where a County Court action is by order of the Full Court reheard before a Judge of the Supreme Court, and the Judge awards costs, but fixes no scale, the Prothonotary in taxing the costs has a discretion which he must exercise as to whether the Supreme Court or the County Court scale shall be applied.

Manfield v. Manfield (17 V.L.R. 228) explained.

In taxing the costs of such an action the Prothonotary may refuse to allow a fee for "instructions for brief," but may allow a fee to counsel, or, alternatively, for drawing proofs, even although no claim for such a fee was made in the bill, and although a "practitioner's" fee had been allowed to counsel's partner.

A Judge will not, on a review of taxation, allow the certificate of the Judge's Associate as to the result of the trial to be rectified.

SUMMONS to review taxation of costs.

On the 16th March 1898 the Full Court allowed the plaintiff's appeal in a County Court action brought by James Henry Curnow, as trustee of the estate of William Samuel Clark, an insolvent, against Damaris Pike, and ordered the case to be reheard before a Judge of the Supreme Court at Bendigo. It was also ordered that the costs of the appeal should be costs in the cause, and that the costs of the first trial before the County Court at Bendigo should abide the event of the rehearing. The rehearing took place before Williams, J., on the 7th May 1898, and, according to a certificate of His Honor's Associate, a verdict was given for the plaintiff for 48*l.* 9*s.* 6*d.* upon the claim, and for the defendant for 33*l.* 13*s.* 6*d.* upon her counterclaim, and the Court then directed that a verdict be entered for the plaintiff for the balance in his favour, 14*l.* 16*s.*, and that the costs of the action be taxed and paid by the plaintiff to the defendant. Upon the taxation of the costs certain objections were carried in by the plaintiff. The taxing officer, after hearing the solicitors of the parties, stated his reasons as follows (so far as they are material to this report):—

"*Items 41 to 67 inclusive.*—I refuse to go behind the orders of the Court. The order of the Full Court allowing the appeal reads—'And this Court doth further order that the costs of the appeal shall be costs in the cause.' 'Costs in the cause' are

'costs of the action:' *Sweet's Law Dictionary—Costs*, 5. The order of the Court on the rehearing before Williams, J., runs:—
'His Honor . . . directed that the defendant's costs of the action be taxed and paid by the plaintiff to the defendant.' Therefore, as the costs of the appeal are to be included in the costs of the action, and the costs of the action are awarded to the defendant, I disallow the objection.

"*Items 68–143 inclusive.*—Although by the rehearing the case does not become a Supreme Court action in the ordinary meaning, yet it must be regulated as far as possible by the usual practice of the Court: *Mansfield v. Mansfield* (a). The usual practice of the Supreme Court is that costs are taxed by the taxing officer of that Court upon the Supreme Court scale. I therefore disallow this objection.

"*Item 101.*—I allow this objection, but I allow 8*l.* 8*s.*, including 1*l.* 1*s.* and 2*l.* 2*s.* respectively allowed in items 114 and 115 as fee to counsel, or, alternatively, for drawing proofs: *In re The Portland and Western District Freezing Company Limited v. Austral Otis Company Limited* (b).

Item 101 in the bill of costs was for "instructions for brief for counsel, etc., 30*l.*"

The plaintiff now made an application on summons for a review of taxation:

As to items 41 to 67, upon the ground that the Judge upon the rehearing directed the costs of the rehearing to be paid by the plaintiff, but refused to deal with the costs of the appeal or of the previous action.

As to items 68 and 143, on the ground that these items had been taxed and allowed under the Supreme Court scale instead of the County Court scale. That, notwithstanding the rehearing before a Supreme Court Judge, the action still remained a County Court action, and the costs should have been taxed and allowed accordingly.

As to item 101, allowance of 5*l.* 5*s.* as counsel's fee, on the ground that taxing officer had no power on the review before him to substitute "a counsel's fee" for "instructions for brief," that he had previously allowed a practitioner's fee to counsel's

(a) [1891] 17 V.L.R. 228.

(b) [1897] 23 V.L.R. 462.

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partner, and that he had also allowed for drawing proofs, five folios.

Meagher for the plaintiff—As to items 41 to 67, the certificate of the Judge's Associate of what took place at the rehearing is incorrect, and we ask that evidence as to what then occurred should be received. The action still remains a County Court action, although tried before a Judge of the Supreme Court: *Mansfield v. Mansfield* (c). In *Randall v. Smith* (d), the question was not gone into fully.

[HOLROYD, J. That case shows that the Prothonotary has a discretion to tax upon either scale.]

He has not exercised any discretion here. He considered himself bound by the practice.

Counsel referred also to *O'Hara v. Rochford* (e), and to rule 157 of the "County Court Rules 1884."

As to the item "instructions for brief, 8*l.* 8*s.*," the solicitor has put in the bill of costs the item, and it is found upon the taxation that it cannot be allowed as such; nevertheless, the taxing officer allows the item to be changed and put in another way. This he ought not to have done.

[HOLROYD, J. Is it not merely a wrong name? I do not, so far as some of these objections are concerned, think it necessary to call upon Mr. Crocker. With regard to items 41 to 67, I think the taxing officer was right in awarding the defendant the cost of the appeal. From the certificate of the Judge's Associate it appears that upon the rehearing the learned Judge directed that the defendant's costs of the action should be taxed and paid to him by the plaintiff. The Full Court had directed that the costs of the appeal should be costs in the cause. Therefore the taxing officer was only following the direction of the Full Court in giving the defendant the costs of the action.

As regards items 68-143, I am inclined to think that the taxing officer has misapprehended the effect of *Mansfield v. Mansfield*. This case, in summing up the authorities, seems to me to state that the rehearing of a County Court case before a

(c) 17 V.L.R. 228.

(d) [1877] 3 V.L.R. (L.) 56.

(e) [1885] 11 V.L.R. 100.

Judge of the Supreme Court is a part of the County Court action, but that the Prothonotary of the Supreme Court is to tax the costs. No scale of costs is provided, therefore the Prothonotary is to tax the costs at his discretion. If that is the result of the case, of course, it must be followed. If, however, I were free to express my own opinion, if I have misread the case in question, I should say that the costs of a rehearing should be taxed on the County Court scale, but this case seems to me, if correctly reported, to intimate that the Prothonotary is to tax the costs at his discretion without being bound by either scale. If so, he does not appear to me to have exercised any discretion in this matter. As to the item of 8*l.* 8*s.* for "instructions for brief," I think the taxing officer was justified in allowing it under the term "fee to counsel"—that is to say, the principle under which he allowed it was correct. He was justified in allowing something for counsel's attendance in Court, whether the attendance was that of counsel himself or of his partner, and the item should have been included under the heading of brief and allowed for making a fair copy for his own or his partner's use, whichever it might be.]

Crocker for the defendant—The costs in *Mansfield v. Mansfield* were taxed on the Supreme Court scale. This is a Supreme Court judgment, and the Prothonotary cannot apply the County Court scale to a Supreme Court judgment. He relied upon *Randall v. Smith* (f).

HOLROYD, J. I propose to refer the matter back to the taxing officer in order that he may exercise his discretion. He is not bound to tax the costs of a rehearing upon the Supreme Court scale, although he may do so if he likes. I shall reserve the question of costs until that item comes back.

The taxing officer reported that he had upon the taxation exercised his discretion in awarding costs upon the Supreme Court scale, whereupon *Meagher* on behalf of the plaintiff applied for a stay of proceedings until the certificate of the

(f) 3 V.L.R. 56.

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Judge's Associate could be rectified. He offered in the meantime to pay the amount of the costs into Court. It was alleged that the order of the Judge dealt merely with the costs of the rehearing.

HOLROYD, J. How far is the certificate of the Associate binding? Ought you not to have taken proceedings to set it aside? I think that at present I ought to dismiss this summons without prejudice to any steps the plaintiff may be advised to take to set right the Associate's certificate and to any other proceedings he may think fit to take thereupon. I allow the defendant 5*l.* 5*s.* costs.

Summons dismissed.

Solicitors for plaintiff: *B. P. B. Rymer* (for *Quick, Hyett & Rymer*, Bendigo).

Solicitors for defendant: *Connelly, Crocker & Paling* (for *Connelly, Tatchell & Dunlop*, Bendigo).

R. H. C.

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1898

July 29.

LONG v. MILLETT AND ANOTHER.

Practice—County Court—Action for slander—Separate counts—General verdict.

Where in an action in the County Court for slander several separate and distinct utterances are alleged, upon one of which no evidence is given, it is the duty of the Judge sitting without a jury to make a separate finding of fact upon each allegation. He may not in such a case give a general verdict.

APPEAL from the County Court at Sale.

Action for slander by Alice Long, a domestic servant, against George Millett and his wife, Helena Millett. In her particulars of claim the plaintiff demanded 200*l.* damages in respect of four slanders alleged to have been spoken and published on 26th, 28th, 29th, and 30th October 1897. At the trial, at Sale, before a County Court Judge sitting without a jury, no evidence of publication of the slander alleged to have been spoken on the 28th October was given. The Judge gave a general verdict in favour of the plaintiff for 50*l.* and costs. No objection was made as to the form of the verdict. No objection was made at the trial.

From this judgment the defendants appealed.

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Duffy (*Meagher* with him) for the appellants—There being four distinct counts for slander, and each count being a separate cause of action, the general verdict is bad, because upon two of the counts no evidence was given by the plaintiff. In *Empson v. Griffin* (a), some evidence was given upon a bad count. There the Judge gave a general verdict, and to save expense entered judgment for the plaintiff on one count. He could not legally do that, because the evidence on the bad count having gone to the jury, and the jury not having been told to ignore it, it could not be said how much damages was given upon the bad count.

Counsel referred to *Nolan v. Chirnside* (b), and to *Chitty's Archbold* (14th ed.), pp. 666, 667.

Bryant for the respondent—There are no pleadings in the County Court. If there is an action for slander, together with another cause of action, and at the trial four slanders are alleged but only three are proved, it could not then be said that a general verdict for the slander would be bad.

[WILLIAMS, J. Each utterance is a separate and distinct cause of action.]

According to *Lee v. Riley* (c), a plaint in the County Court is not to be construed with the same strictness as pleadings in the Supreme Court. There is no authority for the proposition that where a general allegation of slander is made, and no particulars are asked for or given, the plaintiff may not prove more than one slander.

[A'BECKETT, J. If a claim for damages for slander be included with one for goods sold and delivered in the same plaint, and no evidence is given in the latter claim, and the Judge enters a verdict for 50*l.*, could the Court say that one portion of the 50*l.* should be attributed to the latter.]

The Judge would not be obliged to discriminate. Here there is only one cause of action. Under Sec. 134 of the *County Court Act* 1890 the Judge shall make a note "of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto and his decision thereon

(a) [1839] 11 A. & E. 186.

(b) [1873] 4 A.J.R. 68.

(c) [1865] 18 C.B. N.S. 722.

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and of his decision of the action," etc. That is a special remedy given. In order to test the whole decision a litigant cannot obtain the Judge's notes and an order *nisi*. At the trial in this case the parties dealt with three out of the four alleged utterances of the defendant Helena Millett. The Court must assume that the learned Judge, acting reasonably, did not pay any attention to the particular utterance no evidence of which was given. It is absurd to suppose that the Judge gave a verdict with regard to the slander about which no evidence was given.

Counsel referred to *Odgers on Libel* (2nd ed.), p. 595, and to secs. 87 and 93 of the *County Court Act* 1890.

Duffy in reply referred to *Palmer v. Hummerston* (d).

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., and WILLIAMS and A'BECKETT, JJ.] In spite of the fact that pleadings in the County Court have been got rid of in order to save the expense which attaches to pleadings in the Supreme Court, it seems to be quite clear that the Legislature intended that the issues to be determined in any given case should be made plain, and should be kept distinct one from the other. Although the plaint summons states the plaintiff's cause of action, the defendant may, as soon as the case is opened, be asked for his defence, and to place distinctly before the Court the points upon which he relies. The issues are then presented to the Judge in a definite form for his determination. If this is not done great obscurity and difficulty may be caused, especially if the action goes on to appeal, by the indistinct manner in which the merits of the case are set forth.

In this case four separate slanders are alleged by the plaintiff, one of them depending upon entirely different circumstances from the three others, and upon a different aspect of the law. This count is set out in the plaint, and is as carefully drawn a count for slander as it would have been in the Supreme Court. It is a separate and distinct count, and a separate and distinct cause of action. It is admitted that

(d) [1883] 1 Cab. & Ellis 36.

the trial of the action no evidence was given in support of this particular count or cause of action. The learned County Court Judge has given a general verdict. It is quite consistent with that verdict that damages were given in respect of the particular count upon which no evidence had been given. He should make it plain that the judgment upon each count is recorded, and that he determined each issue separately, so that the record is clear. He should put it thus in his judgment—"As to the first count I find, etc.; as to the second I find, etc.," and so on. And when this is done he may give judgment for the total amount of the damages so found, and the judgment would be entered thus on the register of the Court. Here it is impossible to disentangle the findings upon each count. It is absurd to suppose that a Judge should be allowed to deprive defendant of the right of coming to Court and cross-examining witnesses, and yet to give judgment upon the particular cause of action as to which defendant has been so treated. In such a case the judgment cannot stand. So long as I can remember this principle of law has prevailed.

The appeal will be allowed with costs; the judgment appealed from set aside with costs; the case to be retried before a Judge of the Supreme Court. Costs of the first trial to abide the event of the second. The case will be tried at Sale.

Appeal allowed.

Solicitors for plaintiff: *Eggleston & Derham* (for *Bushe*, Sale).

Solicitors for defendants: *Lyons & Turner* (for *G. H. Wise*, Sale).

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[IN CHAMBERS.]

BIGGS v. KELLY AND ANOTHER.

*Practice—Application for jury—Declaration of trust—Alternative claim for damages
—Discretion—" Rules of Supreme Court 1884 "—Order XXXVI., rr. 3, 6.*

Where in an action the relief claimed is a declaration of trust in respect of certain property, and a transfer of such property to the plaintiff, or in the alternative damages for breach of agreement, such action does not come within the terms of Order XXXVI., r. 6, and a Judge has a discretion to refuse an application for a jury.

Amoretty v. City of Melbourne Bank (8 A.L.T. 128) distinguished:

SUMMONS.

In his statement of claim the plaintiff Biggs set forth these facts:—In 1892, while the defendants were negotiating with the Mount Lyell Gold Mining Company No Liability for the acquisition of the company's mine, they agreed with the plaintiff that, if he used the best endeavour to bring the negotiations to a successful termination, they would give him 1,500 shares in a new company to be formed. The plaintiff fulfilled his part of the agreement, and the sale took place. A new company, the Mount Lyell Mining Company No Liability, was subsequently formed, but the defendants, in breach of the agreement, refused to transfer the 1,500 shares to the plaintiff. Alternatively the defendants or the defendant Kelly were or was allotted 1,500 shares in the new company, and were trustees or was a trustee of these shares for the plaintiff, and in breach of trust did not transfer these shares to the plaintiff, but appropriated them and the dividends upon them. The defendants were or the defendant was allotted 750 shares at the price of 5s. a share in respect of the 1,500 shares to which the plaintiff was entitled. The Mount Lyell Mining and Railway Company Limited was formed in 1893, and took over the property of the Mount Lyell Mining Company No Liability, and the defendants or the defendant Kelly received 2,250 shares fully paid up to 3*l.*, in respect of the shares in the latter company, to which the plaintiff was entitled. Subsequently 750 more shares in the former company were allotted to the defendants or to Kelly upon payment of 3*l.* a share.

Upon these facts the plaintiff claimed :—1. A declaration that the defendants, or, alternatively, the defendant Kelly, was a trustee for the plaintiff in respect of 3,000 shares in the Mount Lyell Mining and Railway Company Limited, and that the defendants, or, alternatively, the defendant Kelly, may be ordered to transfer the shares to the plaintiff upon payment by him of 5s. a share on 750 shares, and of 3l. a share on 750 shares. 2. Alternatively 50,000l. damages for breach of the agreement to allot to the plaintiff the 1,500 shares in the Mount Lyell Mining Company No Liability. 3. Accounts and inquiries as to receipt of dividends or payments upon the shares claimed and an order directing payment of the amount of such dividends or payment to the plaintiff.

In his defence each defendant denied the allegations of the plaintiff, and raised certain objections of law.

The plaintiff now applied on summons for an order that the action be tried by a jury.

Levers for the plaintiff—This is a common law action. The principle of *Amoretty v. City of Melbourne Bank* (a) applies.

Coldham for the defendant Kelly—The relief claimed is, in the first instance, equitable. The claim for damages is merely alternative.

Cussen for the defendant Orr—The basis of the action is equitable.

Counsel referred to *Boyle v. Basan* (b).

Cur. adv. vult.

WILLIAMS, J. The question I have to consider is whether this application falls within rule 6 or rule 3 of Order XXXVI. When the application was argued before me, I was inclined to think it fell within rule 6, and that therefore I had no discretion; but upon further consideration I have come to the conclusion that it falls within rule 3, and that I have a discretion to grant or refuse the application. The first relief sought in

(a) [1886] 8 A.L.T. 128.

(b) [1886] 8 A.L.T. 62.

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the action is a declaration that "the defendants or one of them" are trustees of these shares for the plaintiff, and there is a claim for an order transferring the shares to him. The claim for 50,000*l.* damages for breach of contract is only alternative, and it is perfectly evident to me that this is an action or suit which could not have been brought before the *Judicature Act* in a court of common law at all—it is a matter entirely within the equitable jurisdiction of the Court. The plaintiff cannot, by merely asserting an alternative claim for 50,000*l.* damages, bring the action within the provisions of rule 6 of Order XXXVI. In saying this I do not think I am in any way in conflict with the decision in *Amoretty v. City of Melbourne Bank (c)*. In that case there was a distinct cause of action for dishonour of a cheque and claiming damages: therefore I do not express any opinion about that case, because I think it distinguishable for the reasons I have stated. The summons will be dismissed.

Summons dismissed.

Solicitors for the plaintiff: *Hamilton, Wynne & Riddell.*

Solicitors for the defendant Kelly: *Attenborough, Nunn & Smith.*

Solicitors for the defendant Orr: *F. G. Smith, jun.*

[On 6th September an appeal from this order was dismissed with costs.—ED.]

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[IN CHAMBERS.]

BLEASBY v. ROMNEY.

1888
July 29.Holroyd, J.

Practice—Examination de bene esse, application for—Affidavit in support of, sufficiency of—Material witness.

Upon an application for an order to examine a witness *de bene esse*, the affidavit stated that the witness was "a material and necessary witness for the plaintiff in this action," and further stated that in the opinion of the solicitor the plaintiff could not safely proceed to trial without his evidence.

Held, that the affidavit should state generally what the witness was going to prove so as to satisfy the Court that he was a material witness, and that it was not sufficient merely to state that he was a material witness.

THIS was an application on behalf of the plaintiff for leave to examine a witness upon an examination *de bene esse*. The witness was dangerously ill, and medical certificates as to the nature and extent of the illness were verified by affidavits.

The affidavits of the solicitor contained the statement that the person sought to be examined was "a material and necessary witness for the plaintiff in this action, and, in my opinion, the plaintiff cannot safely proceed to trial without his evidence."

The action was for the recovery of land, the defence being adverse possession.

Wilmoth in support of the application.

The managing clerk to defendant's solicitors to oppose—There is an objection to the application upon the materials before the Court. It is not sufficient to state that a witness "is a material witness"—some facts should be stated so as to satisfy the Court that his evidence will be material. Your Honor decided this in the case of *Demergne v. Shackell* (unreported), following the decision in *Langen v. Tate* (a).

Wilmoth—In an action for recovery of land there are no special issues; the defendant sets up adverse possession. The only evidence available will be to prove acts of ownership.

[HOLROYD, J. But you should satisfy the Court that the witness is a material witness; he may not be able to prove any of the alleged acts of ownership.]

(a) [1883] 24 Ch. D. 522.

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Wilmoth—The affidavit follows the usual form.

HOLROYD, J. I will allow the plaintiff to file a short affidavit stating the facts which tend to show the materiality of the evidence of this witness. I do not wish to deviate from what appears to be the practice in England. To prove that a person is a material witness the Court must know what he is going to prove ; it cannot be satisfied as to that by a mere statement that "he is a material witness." The plaintiff may state generally that he is to be called to prove "acts of ownership or possession." The plaintiff may file an affidavit at once to this effect, and I will make the order upon that being done.

Solicitors for plaintiff : *Wilmoth & Son*.

Solicitors for defendants : *Wisewould, Gibbs & Wisewould*.

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NOTE.—In the case of *Wallace v. Wallace* ([1898] No. 240) an application was made by the defendant for an order for a commissioner to examine witnesses in New South Wales, and the objection was taken by Weigall as counsel for the plaintiff that the affidavit was insufficient, inasmuch as it did not state any facts from which the Court could draw any inference as to the materiality of the witnesses. The affidavit was in the same form as in *Bleasby v. Rowney*, which case was cited to Hodges, J. In delivering judgment dismissing the application, upon other grounds the question was dealt with as follows:—HODGES, J. I have not to determine the other objection as to whether or not the applicant's affidavit ought to have set out the facts to which the witnesses can depose. I am not clear about the question. My impression is that it was not necessary so to do, and I was not aware that the former practice had been departed from. The authorities, however, seem to point to such a departure. If, however, it became necessary to decide it, and if I felt myself bound by the authorities, I should have given the defendant an opportunity of amending his affidavit.

[PRACTICE COURT.]

LITTLE v. LITTLE AND ANOTHER.

1898
August 2.Hodges, J.

Practice—"Rules of the Supreme Court 1884"—Order XXVII., rr. 11, 12—*Motion for judgment on default of pleading—Several defendants.*

The plaintiff brought an action against A, an executor, asking for accounts upon the footing of wilful default; B was subsequently joined as a defendant interested in the residue of the estate. B delivered a defence to the action, but A was in default, not having delivered any defence. The plaintiff thereupon applied by way of motion to have judgment entered against A, under Order XXVII., r. 11. B was not made a party to the proceedings.

Seemle, that the provisions of Order XXVII., r. 11, were not applicable to a case where there were several defendants, and the provisions of Order XXVII., r. 12, were only applicable where the cause of action was severable.

Held further, that there was no separate severable cause of action, and that the motion should be dismissed.

THIS was an application by way of motion under Order XXVII., r. 11, on behalf of the plaintiff, to have judgment entered against the defendant, W. Little, as upon the statement of claim the plaintiff might be considered to be entitled to.

The action was originally brought by the plaintiff against the defendant, W. Little, as an executor, claiming accounts upon the footing of wilful default; subsequently the plaintiff added G. Little as a defendant, he being interested as a legatee in the residuary estate, but no relief was asked as against him. The defendant G. Little put in a defence, but the defendant W. Little was in default and had not delivered his defence within the extended time. Application was now made, as above stated, to have judgment entered against the defendant W. Little; but the defendant G. Little was not made a party to the proceeding. Upon the motion coming on for hearing before Hodges, J., the question was argued as to circumstances under which the defendant W. Little had made default in delivering his defence; there had been two extensions of time by consent, and when subsequently the defence had been delivered, the plaintiff refused to accept the same on the ground that it was out of time, and that the costs of this motion had been incurred. The learned Judge dismissed the application upon the merits of the case, saying that it was a matter merely of costs, holding that the

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defendant had been in default, but allowing him now to deliver his defence within twenty-four hours. This case is not reported upon the facts, but upon the technical objection raised as to the nature of the application.

Higgins in support of the motion.

Irvine to oppose for the defendant W. Little—This motion is based upon the provisions of Order XXVII., r. 11, which are not applicable when there are several defendants. Rule 12 is the only available rule when there are several defendants, and then an interlocutory motion of this character can only proceed against one defendant where the cause of action is severable.

[HODGES, J. I have only to consider whether this is a separate cause of action, so far as the defendant W. Little is concerned ; there is no claim at all against the other defendant.]

But the other defendant has been added as a necessary party, and he has a right to be heard in any decree that is to be pronounced. There is no separate cause of action against W. Little ; it is all one cause of action.

Higgins—No relief is sought as against G. Little, and his defence raises nothing to try ; he is merely a formal party. The judgment can only affect the real defendant, W. Little, and if he has made default in pleading, then rule 11 of Order XXVII. is applicable. Under Order XXVI., r. 40, the defendant G. Little can be served with notice of the decree. This is not an ordinary action, but merely one against an executor claiming accounts upon the footing of wilful default.

HODGES, J. (His Honor intimated that he would dismiss the motion without costs upon the facts disclosed in the affidavits.) One question, however, was raised, about which I should express my opinion, as during the argument I was adverse to the contention of Mr. Irvine. On consideration I think he was right in the view he argued. This motion was set down, no doubt, under Order XXVII., r. 11. Now rule 12 of that order provides that where there are several defendants in an action, and one of

such defendants makes default, the plaintiff may, if the cause of action be severable, set down the action at once on motion for judgment against the defendant so in default, or may set it down against him as soon as it is entered for trial, or set down on motion for judgment against the other defendants. The question here is whether the cause of action is severable within the meaning of that rule. That is, that there is something separate to be dealt with, that with regard to the other person brought before the Court there is a totally different, severable subject matter to be dealt with. I think that that is the only kind of judgment which is intended to be given against one defendant under rule 12. In this present case, so far as Geo. Little is concerned, there is admittedly no separate cause of action as against him. As I understand the facts, there is only one cause of action, and that one is against W. Little; the other defendant, G. Little, is brought in merely as a necessary party, and as one who is entitled to have some voice in the judgment to be pronounced at the hearing. For that reason I should say, if I had to determine it, that G. Little should be heard upon any motion for judgment, and that the present application is wrong. However, I have dismissed the motion upon the other grounds dealing merely with the merits of the case.

Motion dismissed.

Solicitors for plaintiff: *Crawford & Ussher.*

Solicitors for defendants: *Lamrock & Hall.*

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May 4, 6.

COWIE v. BERRY CONSOLS EXTENDED GOLD MINING COMPANY
NO LIABILITY (No. 1).

Wrongs Act 1890 (No. 1160), ss. 14, 15—Mines Act 1890 (No. 1120), s. 366—Miner—Death by negligence—Action by representative—Jury, necessity for.

The action for negligence given by sec. 366 of the *Mines Act 1890* to the personal representatives of a person killed on the spot in a mine is not a new form of action, apart from sec. 14 of the *Wrongs Act 1890* (Lord Campbell's Act), and the damages awarded are to be assessed and apportioned as under the latter Act.

A jury is not indispensable in an action under sec. 14 of the *Wrongs Act 1890*.

Eckold v. Chiltern Valley G. M. Co. (17 V.L.R. 213) overruled.

The Franconia (L.R. 2 P.D. 163) explained.

APPEAL from an order of Williams, J.

The plaintiff was administrator of the estate of Alexander Cowie, deceased, and as such brought an action against the defendant company to recover damages for the negligence of the defendants, causing the death of Alexander Cowie.

By the statement of claim it was alleged that on or about the 31st July 1897 the plaintiff was in the employment of the defendants as a trucker in their mine, and that while working in the mine he was killed by foul air which was in the mine, and that his death was caused by the negligence of the defendants.

The defence was a denial of negligence, and an allegation of contributory negligence.

At the hearing before Williams, J., without a jury, the defendants raised the objection that this action was one under Lord Campbell's Act (the *Wrongs Act 1890*, sec. 14) and that, therefore, by sec. 15 of the *Wrongs Act*, the case must be tried by a jury. Williams, J., considered he should follow the case of *Eckold v. Chiltern Valley G. M. Co. (a)*, and that as he had no jurisdiction to assess the damages the case must be tried before a jury. He therefore made an order adjourning the case.

From that order the plaintiff now appealed.

Bryant and Schutt for the appellant—Even if a jury be necessary in an action under the *Wrongs Act*, this action is brought, not under that Act, but under sec. 366 of the *Mines*

(a) [1891] 17 V.L.R. 213.

Act 1890. That section gives a separate right of action in these cases. It gives the right to the "personal representatives of the person so killed" to compensation by way of damages.

[A'BECKETT, J. It is only by Lord Campbell's Act that you can get any intelligible mode of assessing damages. The *Mines Act* was passed in the interest of miners. But if the damages are to go by that Act to personal representatives, that must mean to the representatives of a man's estate, and then creditors could prove on the estate, and so the position of the wife or child would be worse under the *Mines Act* than under the *Wrongs Act*.]

The *Mines Act* is subsequent legislation. A jury was necessary under Lord Campbell's Act, because at that time there could be no assessment of damages without one; but now by Order XXXVI. r. 2, the actions which may on the request of a party be tried by a jury are specified, and an action under Lord Campbell's Act is not among them.

Counsel referred to *Eckold v. Chiltern Valley G. M. Co.* (b); *Kaye v. Ironstone Lead G. M. Co.* (c); *Bradshaw v. Lancashire and Yorkshire Railway Co.* (d); *Bulmer v. Bulmer* (e).

Box (*Purves, Q.C.*, with him) for the respondents was heard as to the question of the necessity of a trial before the jury.

Counsel referred to *In re East London Railway Co.* (f); *The Franconia* (g); *Beven on Negligence* (1st ed.), 194.

MADDEN, C.J. This case was set down for trial before a Judge without a jury, and when it came on for trial before our brother Williams objection was taken on behalf of the defendant that the action was one brought under Lord Campbell's Act, our Statute of Wrongs, and that under that statute it was indispensable that the trial should be before a jury. The plaintiff met that objection, not by contesting then that if it were an action under that Act a jury was not

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(b) [1891] 17 V.L.R. 213.

(c) [1876] 2 V.L.R. (L.) 148.

(d) [1875] L.R. 10 C.P. 189.

(e) [1883] 25 Ch.D. 409.

(f) [1890] 24 Q.B.D. 507.

(g) [1877] 2 P.D. 163; Bramwell, L.J., at p. 171.

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indispensable, but that it was not an action under that Act. It was a confession and avoidance of the point. The plaintiff says that sec. 366 of the *Mines Act* 1890 practically gave another action apart from and different from that given by Lord Campbell's Act, and that really it was an action by the general representatives of a dead man to recover the damages which his estate had suffered by his death. On that point brother Williams held that that view was not correct, but it was insisted on by counsel for the plaintiff, and then the Judge, apparently as an indulgence, adjourned the case, instead of going on with it and entering a nonsuit—adjourned it, I suppose, with a view of allowing counsel to consider the case, and then applying for a jury if he thought fit. An appeal was heard from that order, and counsel for the plaintiff raised the same contention again. That is the first point we have to deal with. We think that that contention, at any rate in the case of a man who has been killed outright, is erroneous. Section 366 of the *Mines Act* is peculiar in one respect. It provides that "if any person employed in or about any mine . . . be killed . . . the personal representatives of the person so killed may recover from the owner compensation by way of damages as for a tort committed by such owner." Now, when that enactment was made no action of tort accrued to the personal representatives, for personal injuries in the case of a man who had been killed, except under Lord Campbell's Act. That action was not for the benefit of the dead man's estate but for the benefit of certain specified persons—viz., the kindred pecuniarily interested in the dead man's life. Now, we think that as the Legislature has in sec. 366 made no reference to any new form of action, but merely speaks of an action for the recovery of damage as for a tort, without in any way specifying the persons on whose behalf the action is to be brought, we must take the Legislature to refer to the action which was then known—viz., an action under Lord Campbell's Act. Section 366 uses the words, that if a person be injured, then he or his personal representatives may recover damages. It seems difficult to say that the words "personal representative" are not equivalent to the representatives of his estate, acting on behalf of him.

estate. It may mean that, if a man is injured, and lingers, and is put to expenses for medical attendance, etc., and before he can recover damages in respect of those expenses dies, his estate may be reimbursed those expenses whereby he has wasted his estate. However, it is unnecessary at present for us to decide that, for in this case the person was killed outright, and we think in that case the action must be under Lord Campbell's Act. We think that is the more manifest because any other form of action would be ridiculous. The Legislature here evidently intended to protect miners. The intention is in the first instance to take every possible precaution for their safety, and then by sec. 366 they provide that if by reason of any neglect of these precautions a miner is killed those who are dependent upon him are to be compensated. But if the contention argued for before us were the true one, those persons are the very last who would get a sixpence of any compensation recovered. They would have no right except to get anything left over after the creditors of the estate had been paid. In order to get the measure of damage it would be necessary to show that the man who was killed was in a position to save money, whereas it is common knowledge that in most of these cases he is a person who lives from day to day, saving little or nothing. We therefore cannot suppose, in the absence of express language to the contrary, that the Legislature intended to introduce in the *Mines Act* a form of action less beneficial to the relatives of a miner than that given by Lord Campbell's Act.

We also think the contention on behalf of the defendant is also wrong. That contention was that the action could only be tried before a jury. It is very true that the defendant was supported in that view by the decision of Webb, J., in *Eckold v. Chiltern Valley Gold Mining Company*. There the learned Judge, apparently without much argument, and upon what would seem to be a sudden impression, held that an action under Lord Campbell's Act could only be tried before a jury. We think, however, that since the *Judicature Act* that is not so. By Lord Campbell's Act it is provided that the damages shall be assessed by a jury. But we think that must be read as having reference to the fact that at the

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time Lord Campbell's Act was passed a jury was the only tribunal which assessed damages in any action. There was no such thing as a trial before a Judge without a jury. One of the express objects of the *Judicature Act* was to do away with juries in a very large number of cases. Order XXXVI., r. 2, sets out the various actions which, at the desire of either party, may be tried before a jury. All other actions are not to be tried before a jury unless a Judge expressly orders. But we think that when that universal language was used the intention must be imputed to the Legislature, when they did not include actions under Lord Campbell's Act, to have excluded them, unless an express order for a jury were made. There is nothing to show that a jury is indispensable on the hearing of such an action. In the case of *The Franconia* there is a dictum of Bramwell, L.J., that such an action could only be tried before a jury. As a matter of fact that is but a dictum, and we think, in view of the decision of this Court in *Hitchins v. Mayor of Port Melbourne* (h), we should not follow that dictum. In that case the decision of this Court proceeds upon this statute. It was tried before a Judge without a jury, and therefore the proposition which is now presented to us must have occurred to the Court. Yet through two trials and two considerations before the Full Court the point was never raised. We think for these reasons a jury is not indispensable. The result is that this appeal will be allowed on the ground that defendant's contention below was wrong, and the object for which the adjournment was granted was unnecessary. The action being one under Lord Campbell's Act the statement of claim may need to be amended, and we think the plaintiff should be allowed to amend if he thinks fit. Under the circumstances of this case, we think that costs below and of this appeal should be costs in the cause. The plaintiff was wrong in his contention ; so was the defendant in its, although it was sustained by the authority of Webb, J., already referred to.

A'BECKETT, J. I also wish to say a few words as to *The Franconia*. That case is peculiar in this way, that two of the Lords Justices say—"As to the words 'the jury may give,' that

(A) [1889] 15 V.L.R. 761.

might possibly be held to mean 'jury' where there was a jury, and court where there was not." Now, that view is consistent with the one we take. But, then, their Lordships go on to say—"But whether or no, we are of opinion that, under that section, it must be a jury who find and direct the division into shares." That expression of opinion is one with which I cannot agree. I cannot suppose that different tribunals were intended, or could possibly be permitted under that section. The possibility of substituting one tribunal for the other is admitted as to the amount of damages; and I can see no reason why, that admission being made to that extent, the same substitution of tribunals should not be allowed in the case of apportioning the damages. That, to my mind, destroys the value of the expression of opinion, and relieves me from any difficulty in coming to a conclusion opposed to that of such eminent Judges.

HOOD, J. I wish to add a word as to *The Franconia*, and as to the *dicta* of Bramwell and Brett, L.JJ., in that case, who were the minority of the Court, though ultimately in *Seward v. Vera Cruz* (i) their view was upheld. The real question in dispute was whether the Admiralty Court had jurisdiction in an action under Lord Campbell's Act. Bramwell and Brett, L.JJ., were of opinion that it had not, for two reasons—one that Lord Campbell's Act did not apply to a case where damage was done by a ship, and the other that that Act directs that the damages shall be assessed by a jury. If I thought that Lord Campbell's Act did direct that these actions should be tried by a jury, I should say that our rules would not override that direction. But I cannot find that that Act does so direct. When Lord Campbell's Act was passed a jury was the only tribunal before which an action could be tried, and I think that the reference in that Act to a jury is merely a reference to the tribunal which is to decide the facts and a direction as to the assessment of damages. By the rules of the Court governing its procedure, unless the parties or either of them desire a jury, every action shall be tried by a Judge, who is then in the position of being both Judge and jury. The view of those

(i) [1884] 10 App. Cas. 59.

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dissenting Judges was adopted on the first ground only, and I not think that we are bound or ought to follow the other reasons.

MADDEN, C.J. We give the plaintiff leave to amend his pleadings if he desires to do so.

Solicitors for appellant: *Dugdale & Creber* (for *Tuthill & Ballarat*).

Solicitors for respondent: *Hughes & Permezel* (for *Mitchell & Nevett & Robinson, Ballarat*).

A. F. M.

1898
 May 27.
 Madden, C.J.

COWIE v. BERRY CONSOLS EXTENDED GOLD MINING COMPANY
 NO LIABILITY (No. 2).

"Rules of the Supreme Court 1884"—Order XXXVI., r. 6—Trial by jury
 Application for jury, when refused.

A jury will be refused in a trial if the costs thereby occasioned are disproportionate to the appropriateness of such a tribunal, or if the case is scientific or abstruse, so that the employment of a jury would cause embarrassment or delay.

APPLICATION on behalf of the defendant under Order XXXVI., r. 6, that the action be tried before a jury.

The facts are set out in the report of the preceding case (*ante*, p. 206).

In accordance with the leave granted by the Full Court at the hearing of the appeal from Williams, J., the plaintiff has amended his statement of claim, and now on the amended pleadings a jury was asked for.

Box for the defendants in support—We would have had no right to a jury had application been made within four days from the close of pleadings. In an action like this it was held by Webb, J., in *Eckold v. Chiltern Valley G. M. Company* (1891) that the matter could be tried only by a jury. The defendant relied on that hitherto unimpeached decision, and thought it sufficient to take the objection against hearing by a Judge alone at the hearing. That case has since been overruled by the Full Court in their proceedings, but the defendants should not suffer by following what at the time was a good decision.

(a) [1891] 17 V.L.R. 213.

Schutt for the plaintiff to oppose—The defendants should have complied with the rule strictly, and applied within the time; not having done so, the onus is now on defendants to show that the case is a fit one to be tried before a jury. Besides, the case is one in which matters of a scientific and technical nature arise unfit for determination by a jury.

MADDEN, C.J. I think it is very clear that the general effect of the *Judicature Act* has been to indicate an intention on the part of the Legislature to limit the trial of actions before juries. Formerly a jury was the only tribunal for the ascertainment of the facts, but now it is intended that a jury shall only be had in special cases, and a judge will carefully scrutinize the circumstances of each application before he grants a jury, even if he be disposed to do so. If this be so, a jury ought to be refused where the costs thereby occasioned would be out of proportion to the appropriateness of a jury as a tribunal, also if it be clearly shown that the case involves some question of an abstruse or scientific nature, or that delay or embarrassment will be caused. It must, however, be borne in mind that the jury has still the full confidence of the Legislature, and a Judge is not at liberty to assume that a jury is not as wise, fair, and capable of protecting itself from fallacious inferences as a Judge. None of the objections I have named have been shown me to exist in the present case, neither is it suggested that any injustice would arise by the case going to trial with a jury in Ballarat when the cause of action arose. It has been pointed out to me that if the defendant originally had applied for a jury in time he would have been entitled to a jury as a matter of right, and that he would have applied for and obtained a jury if he had not been misled by following the decision in a case which has subsequently been overruled. Acting on the principle already enunciated, I can see no reason for refusing this application, which will be allowed.

Solicitors for plaintiff: *Dugdale & Creber* (for *F. H. Tuthill*, Ballarat).

Solicitors for defendants: *Hughes & Permezel* (for *Mitchell*, *Nevett & Robinson*, Ballarat).

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Holroyd, J.

[PRACTICE COURT.]

LOFT v. WADE (No. 1).

Estoppel—Res adjudicata—Dismissal by justices—Certificate—Justices Act 1890 (No. 1105), s. 77 (17).

Semble, per HOLROYD, J. A certificate of dismissal of an information or complaint issued under sec. 77 (17) of the *Justices Act 1890* is not a bar to subsequent proceedings in respect of the same subject matter and between the same parties when the first case was not heard upon its merits.

ORDER TO REVIEW.

On 3rd June 1898 an information for a penalty under sec. 20 of the *Dog Act 1890* was made by Robert Edgar Loft against William Wade, at the Court of Petty Sessions, Melbourne. The offence charged was that the defendant's dog attacked Loft in a public place. At the hearing the police magistrate dismissed the information. The defendant obtained a certificate of dismissal of the information. Subsequently, on 8th June 1898, Loft issued a complaint against the defendant for compensation in respect of the same alleged cause of action. Upon the hearing before justices at the same Court of Petty Sessions the defendant produced the certificate of dismissal of the information, and objected that the certificate produced was a bar to the complaint. The justices overruled the objection, and awarded the complainant 3*l.* 10*s.* as compensation, with 1*l.* 10*s.* costs.

An order to review this decision was obtained on the ground that the production of the certificate of dismissal of the information was a bar to the subsequent complaint for compensation.

R. Hodgson Cole to move the order absolute.

Paul to show cause.

During the argument reference was made to the following authorities:—*Reid v. Nutt* (1) (a); *R. v. Hare, ex parte Schneider* (b); *Tischler v. Wicks* (c).

HOLROYD, J. In this case I am much inclined to think that if the first information was not heard upon the merits, and if the

(a) [1890] 24 Q.B.D. 669.

(b) [1888] 14 V.L.R. 89.

(c) [1887] 13 V.L.R. 712.

objection to the hearing on the ground of previous dismissal was taken, and the justices held that that objection precluded them from hearing evidence on the matter, or from going at all into the merits, the certificate of dismissal would have been insufficient to bar the hearing of the complaint, notwithstanding the very positive words of the statute, sec. 77 (17) of the *Justices Act*. However, I should be sorry to give a decided opinion upon the point until I had heard it more fully argued. But in this case I have before me the certificate of dismissal of an information, which certificate, *prima facie*, is "a bar to any other information, complaint, action, or legal proceeding in any court for the same matters respectively." *Prima facie*, the production of that certificate is conclusive, and in order to destroy its effect (supposing that effect could be destroyed), I ought to have before me some clear, distinct, and positive proof that the case was really not dismissed, but that there was a refusal to hear it, and that the merits were never gone into. I cannot, on the facts before me, decide a question of this sort—upon mere assertion or allegation of counsel's admission—when these statements are contested by the other party. I cannot decide upon assertions made by one party and contradicted by the other. I have no evidence that the certificate is untrue. It is a solemn document, and unless I am quite certain that it is false it must be believed to be properly made. I make the order absolute, with costs. In *Foreman v. M'Namara* (d), A'Beckett, J., discussed the effect of the production of a certificate of dismissal, but did not determine how far the question of merits affected it.

Order absolute.

Solicitor for informant: *A. D. J. Daly*.

Solicitors for defendant: *Darvall & Horsfall*.

R. H. C.

(d) [1897] 22 V.L.R. 50.

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Holroyd, J.

1898
July 28.

Holroyd, J.

[PRACTICE COURT.]

LOFT v. WADE (No. 2).

*Dog Act 1890 (No. 1084), ss. 15, 20, 25—Penalty—Informant—Local authority
Jurisdiction—Justices Act 1890 (No. 1105), Part V., ss. 59, 73, 79.*

In a proceeding under the *Dog Act* 1890, sec. 20, to recover a penalty it was shown that the informant, the person attacked by the dog, had no interest in the penalty, and was not an officer authorized to prosecute by the municipality in which the alleged offence occurred.

Held, that he was not entitled to prosecute.

Held also, with doubt, on the authority of *R. v. Charles* (3 W. W. & A'B. (1852)), that the information should have been struck out as being without jurisdiction.

ORDER TO REVIEW.

Robert Edgar Loft lodged an information against William Wade for that "the defendant on the 10th day of May 1895, Simpson-street, East Melbourne, was the owner of a dog which attacked the informant in a public place contrary to the Act." The charge was heard before the Court of Petty Sessions at Melbourne on the 3rd June 1898. After the informant had stated that he was delivering letters in Simpson-street when the defendant's dog attacked him, objection was taken on defendant's behalf that the informant had no authority from the local municipal council to institute the proceedings, and was not interested in the penalty. The informant admitted his want of authority. No further evidence was given for the prosecution. The Court dismissed the case, with 10s. 6d. costs.

An order *nisi* to review this decision was obtained upon two grounds:—

1. That the Court was in error in deciding that the informant, not being a person duly authorized by the local municipal council, could not prosecute under sec. 20 of the *Dog Act* 1890.
2. That even if the Court was right in so deciding, it had no jurisdiction to dismiss the information or make any order as to costs.

L. F. S. Robinson to move the order absolute—The first ground depends upon a construction of the *Dog Act* 1890, secs. 15, 20, 23, and 24. The offence is a public one, and therefore any person

may be an informer : *Sargood v. Veale* (a). Sec. 15 refers to matters which are purely the concern of the local authorities—*eg.*, registration of dogs, etc. Sec. 20 includes cases of a non-public character. This section contemplates that a person attacked by a dog may lodge an information against the owner of the dog, because, according to the wording of the section, both the information and the demand for compensation may be heard together. The words used are “if he be complainant.”

[HOLROYD, J. If he choose to complain he can get compensation.]

The *Dog Act* does not contemplate that everything in the Act should be in the hands of the local authorities. The informant is a person interested : *In re Goodison* (b).

Counsel referred to *R. v. Panton, ex parte Schuh* (c); *R. v. Hare, ex parte Schneider* (d); *Paley on Summary Convictions* (6th ed.), p. 84.

As to the second ground of the order, directly the Court of Petty Sessions became aware of the fact that the informant was not the proper person to institute the proceedings the Court should have abstained altogether from dealing with the case. The proceedings were *coram non judice*: *R. v. Charles* (e); *Cash v. Cash* (f).

R. Hodgson Cole to show cause—On the first ground, secs. 15 and 25 of the *Dog Act*, read together, show that the enforcement of the Act, and the recovery of penalties under it, is left entirely to the local authority. The rule is stated in *Reg. v. Panton, ex parte Schuh* (g). Sec. 91 of the *Police Offences Act* 1890 corresponds with sec. 25 of the *Dog Act*, and under the former section only a person interested in the penalty can prosecute: *O'Sullivan v. MacMahon* (h).

[HOLROYD, J. The *Dog Act* does not say in so many words that the council has to appoint a person “to prosecute.”]

Counsel referred to *Boyce v. O'Hehir* (i).

(a) [1891] 13 A.L.T. 121.

(b) [1892] 13 A.L.T. 165.

(c) [1888] 14 V.L.R. 529.

(d) [1888] 14 V.L.R. 89.

(e) [1866] 3 W. W. & A'B. (L.) 52.

(f) [1896] 2 A.L.R. 153.

(g) [1888] 14 V.L.R. 529, at pp. 530, 531

(h) [1897] 22 V.L.R. 55.

(i) [1888] 14 V.L.R. 532.

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[HOLROYD, J. Does not sec. 20 of the *Dog Act* seem to point to the conclusion that the person attacked has a right to be informant and complainant at one and the same time?]

It has not been so decided. Where a penalty is sued for the municipal council or its authorized officer must prosecute.

[HOLROYD, J. The words "if he be the complainant," in sec. 20, appear to refer to the "owner of such horse," etc., and not to "such person," and appear to be useless.]

On the second ground, the police magistrate had power to dismiss the information, and to give costs: *Justices Act* 1890, sec. 77 (14), 89 (2). The question was merely as to who was the proper party. The incapacity of the present informant did not involve the question of jurisdiction. The justices had jurisdiction, and therefore could give costs.

Counsel referred to *R. v. Hare, ex parte Stark* (k); *Great Northern, etc., Committee v. Inett* (l); *Irvine's Justices of the Peace*, p. 354; *Justices Act* 1890, secs. 59 (5); *Justices Act* 1896 (No. 1458), sec. 4 (1).

Robinson, in reply, referred to *Keane v. Schuh* (m).

HOLROYD, J. The first point raised in this order to review is a very difficult one to determine. It seems to me to have been the intention of the Legislature when passing the *Dog Act* 1890 that the provisions of the Act should be enforced by the council of the municipality by means of an officer to be appointed generally for that purpose within the limits of the municipality itself. The penalties to be recovered for offences under the Act are to be recovered within any municipal district—and, when recovered, are to belong to the council of the municipal district. Under sec. 20 of the *Dog Act*, if any person or any person's horse, sheep, or cattle are molested or injured in the way described, not only is an amount by way of penalty to be recovered for that offence, but the person aggrieved—that is to say, the person injured, who is himself molested, or whose horse, sheep, or cattle are molested—may recover damages for any actual injury inflicted, the actual injury to himself or to

(k) [1891] 17 V.L.R. 80.

(l) [1877] 2 Q.B.D. 284.

(m) [1890] 16 V.L.R. 199.

his cattle. More than that, so long as he recovers compensation for the damage he has actually sustained, he then must be satisfied with the amount of that compensation. The Act contemplates that there are other matters with which the municipal authorities have power to deal. The vagaries of errant dogs are particularly to be restrained. I think this duty is imposed upon the municipal authorities on behalf of the whole of the inhabitants of that municipal district. This, I think, is the reason why sec. 15 was enacted. I do not look upon an offence under sec. 20 as a crime which, for the general good of the whole colony, should be repressed. This colony is divided into different municipal districts, and for the purpose of keeping order in those districts this section of the *Dog Act* was passed. For that reason—namely, that I think the informant in this case had no interest in the penalty, and that the municipality by its proper officer appointed for the special purpose was the person required by law to take proceedings to enforce all the provisions of the Act—the information was brought by the wrong person, and therefore, I think, so far as that ground is concerned the justices were right.

Upon the second ground of the order *nisi*, though I have a good deal of doubt, I think the authorities which Mr. Robinson has cited bind me. Therefore on that ground I make the order absolute, with costs.

Order absolute.

Solicitor for informant: *A. D. J. Daly.*

Solicitors for defendant: *Darvall & Horsfall.*

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Holroyd, J.

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March 23.

Hodges, J.

[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

ASHLEY v. ASHLEY.

Practice—Divorce—Order for permanent alimony—Appeal—Evidence—Fresh evidence—Admissibility—“ Rules of Supreme Court 1884 ”—Order LVIII., r. 4—Marriage Act 1890 (No. 1166), ss. 87, 88.

Per MADDEN, C.J., and WILLIAMS, J., A'BECKETT, J., *dissentiente*. The principle of *Ward v. Hearne* (10 V.L.R. (L.) 163) applies in an application to bring forward fresh evidence on an appeal from the order of a Judge granting permanent alimony.

Per HODGES, J. Where an order for alimony *pendente lite* has been made, the assessment will be regarded upon an application subsequently for an order for permanent alimony if the circumstances of the parties have not altered in the meantime.

Sed per Full Court [MADDEN, C.J., and WILLIAMS and A'BECKETT, JJ.] The Court will not, in fixing the rate of permanent alimony payable by a husband respondent, consider evidence of expectations, but will be guided entirely by evidence of his present means.

APPLICATION on summons for an order for permanent alimony.

On the 8th November 1897 Caroline Kate Ashley obtained a decree *nisi* for dissolution of her marriage with Edwin William Ashley on the ground of a repeated act of adultery, and obtained at the same time an order giving her the custody of the one child of the marriage. On the 18th February 1898 the decree was made absolute. Madden, C.J., had on the 25th August 1897 made an order in Chambers that the respondent should pay to the petitioner by way of alimony *pendente lite* the sum of 15s. a week. Application was now made under sec. 88 of the *Marriage Act* 1890 for an order that permanent alimony be granted to the petitioner. The respondent was examined and cross-examined as to his means.

From the affidavits and oral evidence it appeared that the respondent was entitled, under the will of his late father, and upon the death of his mother, to a share in the estate of the value of from 6,000*l.* to 8,000*l.* He was, however, prevented by a clause in the will from alienating, encumbering, or in any way anticipating his share. A sum of 800*l.*, which he had received as the proceeds of a legacy under his father's will, he had entirely lost on the business of a farmer, carried on by him

upon a farm leased by him from the executors of his father. Under the will he was entitled also to 40*l.* a year; but this, he stated, had been assigned for a certain period in order to enable him to make certain payments to the petitioner before the suit commenced. The lease of the farm had been assigned to other persons, who, after carrying on the farm under respondent's management for some time, assigned it to respondent's brother. The respondent was now employed by his brother upon the farm at a wage of 10*s.* a week and his board and lodging. This was at present his sole income.

The further necessary facts may be sufficiently gathered from the judgments and arguments.

L. S. Woolf for the petitioner—I rely upon the order of Madden, C.J.

[HODGES, J. You are now asking for permanent alimony.]

The question how far the present application is governed by the order for alimony *pendente lite* is discussed in *Franks v. Franks* (a).

S. B. Backhouse for the respondent—Sec. 88 of the *Marriage Act* 1890 contemplates the alteration of an order for alimony by a Judge either by reducing or by entirely discharging it: by analogy the order for alimony *pendente lite* should not govern the present application.

HODGES, J. In this matter the applicant, Caroline Kate Ashley, had on the 8th November 1897 obtained a decree *nisi* for the dissolution of her marriage with Edwin William Ashley, upon the ground of a repeated act of adultery. In August 1897 an order for alimony *pendente lite* was made by Madden, C.J., who, after hearing the respondent examined and cross-examined as to his means of livelihood, fixed the amount of such alimony at 15*s.* per week. The petitioner now applies to me for an order for permanent alimony, and it is contended on her behalf that I should place reliance upon the order of the Chief Justice.

(a) [1861] 31 L.J. (P.M.A.) 25.

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On the other hand, it is urged on behalf of the respondent, who opposes the present application, that the previous order has nothing to do with this matter, and that as the respondent is earning only 10s. a week, the amount of alimony should be reduced. I am referred to an argument by analogy based upon sec. 88 of the *Marriage Act* 1890. This section does not contain any provision for increasing the amount of alimony, and therefore when the respondent comes into possession of this property left by his father, there will be no means to compel him to pay a larger sum for her support to the petitioner. It appears to me that, unless the circumstances had altered in the interval, I ought not to make an order differing in amount from that of the Chief Justice. At the time that order was made the respondent was the manager of a farm of which he had previously been the lessee from the executors of his late father's estate. In 1895 he had assigned this lease to certain persons, but was retained by them as manager at a salary to be calculated at half the net profits of the farm. But there had not in fact been any net profits, and therefore this change in the circumstances of the respondent from lessee to manager made no material difference in his income. Moreover, it appeared that on the 8th November 1897 the lease was assigned to the respondent's brother, and the latter is now employing the respondent at a wage of 10s. a week on the farm. So that he is to the extent of 10s. a week better off than when the previous application was made. The farm, however, was part of the estate of respondent's father, and the respondent's relatives are well to do. I have seen him in the witness box, and he certainly appears to me to be able to earn more than 10s. a week. He has evidently chosen this means of employment. He seems to be self-indulgent, and prefers to do very little, and to live upon his relatives rather than to work in order to contribute something towards the support of the petitioner, whom, as the evidence given at the hearing of the petition showed, he had treated most cruelly. Under these circumstances I think that I should in this case make an order, and, though with much doubt, for the same amount as has been fixed by the order of the Chief Justice. I order the

respondent to pay permanent alimony at the rate of 15s. a week.

From this order the respondent appealed.

A. H. Davis for the appellant—I ask the leave of the Court to bring forward further evidence upon the joint affidavit of the appellant and his solicitor to the effect that the petitioner and the child of the marriage are entitled under the will of the petitioner's father to a certain beneficial interest in a fund of about 4,000*l*. The appellant's solicitor has stated in the affidavit now tendered the reason why this matter was not brought before *Hodges, J.*, when the application was heard by him. The solicitor states that the facts now stated were made known to him after the order of *Hodges, J.*, was made. The appellant, it is stated, was not aware of the important bearing of these facts upon the matter now before the Court. The Court has power to admit fresh evidence: *Mason v. Mason* (b); *In the Estate of Conroy* (c).

[*MADDEN, C.J.* Does not the rule in *Ward v. Hearne* (d) apply ?]

That decision has reference merely to the admission of fresh evidence upon a new trial motion. In the present case, to refuse to admit the evidence tendered would be to fix a rate of permanent alimony upon an admittedly false basis. A new trial motion is not a final matter. The facts sought to be admitted are undisputed, and no suggestion of manufactured evidence is possible. The petitioner should have brought the full facts concerning her means before the Court.

L. S. Woolf for the petitioner—The respondent's solicitor when he discovered that the petitioner's father was dead was put upon inquiry, and therefore it was his duty to have ascertained the petitioner's means before the application for permanent alimony was made. He should have made searches in respect of the will. He has not exercised proper diligence in the matter.

(b) [1883] 8 P.D. 21.

(c) [1895] 1 A.L.R. 25.

(d) [1884] 10 V.L.R. (L.) 163.

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MADDEN, C.J. As to this application, my brother Williams and myself are of opinion that the affidavit ought not to be received. My brother A'Beckett is not of the same opinion. It appears to my brother Williams and myself that this is a matter depending upon a rule of practice which cannot be too strongly insisted upon. In relation to applications for a new trial on the ground of the discovery of new evidence since the date of the trial, the rule I refer to has been laid down emphatically and unmistakably, and the present application, though not nominally for a new trial, is virtually the same thing. Applications for new trials are jealously regarded, and are regulated by certain well-defined principles of practice, one of which is that a successful litigant should be protected from having thrown upon him or her a new case altogether, based upon some new evidence which might by diligence have been discovered and used at the trial. The Judicature Rules give this Court the right, in matters where it sees fit, to allow new evidence to be admitted before it on appeal, and to determine the matter in issue in the light of that new evidence. That provision is very admirable and very desirable, but it is one which should be administered according to certain well understood principles, and I do not know any statement of those principles more explicit than those indicated in the case of *Ward v. Hearne*. The practice thus laid down is as much the law as is the question whether a husband ought to provide for his wife. The applicant for a new trial must show clearly that the new evidence was not in his possession, and could not by proper diligence have been procured by him at the time of the trial, and he must also show that the newly-discovered evidence, if adduced, would necessarily have led to a different decision. In the present case it is clear that the appellant had knowledge of his wife's position, and of the fact that she had an interest under her father's will, and a right to reside with her mother, and that certainly should have put his proctor upon inquiry, and should have led the latter to investigate the question. It is a matter for observation that the question now sought to be introduced was one which ought to have been presented to the Court by the husband; it formed no part of the wife's case. He knew quite as

much as litigants generally know of the facts of an opponent's case, and we think that a very limited amount of diligence would have enabled him to discover the evidence now tendered, in time for the application before the primary Judge. Then, again, it by no means follows that if the learned Judge had before him the evidence which Mr. Davis says he would now be able to supply, he would not have made the same order. He would possibly have considered that, although this lady was entitled, under her father's will, to get food and shelter from her mother, she would be entitled to be clothed and to receive the ordinary means for getting about from her husband, and he might have held that this sum of 15s. per week would be a very necessary addition to any advantages which she already enjoyed by virtue of her father's will. I think it is of vital importance that rules such as the one in question should be adhered to. If well-known rules are departed from to meet possible hard cases, and decisions are allowed to be lightly upset, infinitely more injustice is, in the long run, done than if the rules are strictly enforced. The principle of *Ward v. Hearne* is, I think, a good one, and should be distinctly adhered to. There is nothing in this case to justify us in departing from it. The application must, therefore, be refused.

WILLIAMS, J. The application which Mr. Davis has made is admittedly an application for the indulgence of the Court, and the Court can only grant such an indulgence on the principles laid down in the case to which the learned Chief Justice has referred—principles which are perfectly well known. It is clear that the onus is on the applicant to show that he could not, by the exercise of reasonable diligence, have procured the evidence which he now seeks to have admitted. In this case, far from the applicant having satisfied us that he could not have obtained it, I am satisfied that, by ordinary diligence, he could have got the evidence, so that he has not discharged the onus. If the proctor had made ordinary inquiries he would have ascertained the facts. Such inquiries would have resulted in having the evidence before the Court below. I think that, upon either of the two occasions upon which alimony was applied for, the proctor or

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the client had ample opportunity to adduce this evidence. The commonest inquiries, or the merest alertness and vigilance, would have furnished this evidence. The applicant now seeks to adduce evidence which could have been very easily obtained at either of the hearings. I do not at all consider the question as to how this evidence would affect the justice of the case. I do not trouble my mind about that, or as to how far it may be unjust to shut the evidence out. I do not get so far as that. It is contrary to a long series of established decisions of this Court to allow this indulgence, unless the applicant discharges the onus of satisfying us to the extent to which I have referred. He has satisfied me that he could have obtained this evidence very easily before if he had set about it. I therefore concur with the Chief Justice.

A'BECKETT, J. (*dissentiens*). I should be disposed to grant this indulgence, because I think the granting of it is essential to the justice of the case, and I think that the rule of practice applying to an application for a new trial is not appropriate in a matter of this kind. This is not, strictly speaking, an application for a new trial at all. It is a case for the exercise of the Court's discretion as between two parties, in ascertaining what would be a proper allowance of alimony, and a case in which it is admitted that the pecuniary position of the wife would be a material question. It is not merely a question whether judgment is to be given for one party or the other, but what is a fair allowance under the circumstances. Now it appears that under this will the petitioner is entitled to be maintained by her mother, and to receive also some other benefits, and that is a very important fact, and its materiality cannot be denied. Then another matter which weighs with me is, that it is at all events questionable whether, when this lady came to the Court to obtain alimony, it would not have been a proper thing for her to have presented all the facts. I do not think it would be right for her, having told her proctor, as it may be assumed she did, what her means were, to rest upon a suggestion that nothing should be said about her means, and that the other side should be allowed to find out the facts if they

could. In making these observations, I am not suggesting any wilful impropriety, but I very much question whether, assuming the matter to have been considered by the wife and her advisers, it would have been right for her to have omitted to give the Court true information as to the means she actually possessed. Then, another thing to be regarded is the fact that the existence of these benefits under the will is not a matter of controversy, as to which false evidence could be given. One of the reasons why the Court leans against new trials is the fact that they afford an opportunity for the manufacture of evidence. That danger does not occur in this case. I do not wish to be understood as saying that, if the rule as to granting new trials is to govern this case, the new evidence should be admitted. We are acting under a rule of Court giving us power to admit new evidence on appeal, and, for the reasons I have stated, I do not think we should be disturbing the general rule of practice by allowing the facts now sought to be introduced to be placed before us, so that we may be able to decide the question of allowance on a right, instead of on an admittedly wrong, basis.

Davis—The actual income of the respondent should be the basis of assessment. The Court cannot consider expectations and possibilities of a larger income. *Fletcher v. Fletcher (e)* establishes the principle, not only that alimony should be based on the actual income, but that if there is no income no alimony should be given. See, also, *Brown v. Brown (f)*; *Gaynor v. Gaynor (g)*. Where the husband's only property is a legacy payable eleven months after the application, the Court refused to allot alimony *pendente lite*. In that case the legacy was marketable. A reversionary interest held by a husband does not entitle a wife to alimony: *Bevan v. Bevan (h)*. It is the wife's duty, if she is able, to support herself: *Nicholls v. Nicholls (i)*; *Goodheim v. Goodheim (k)*; *Kenny v. Kenny and Quin (l)*. The ability of a wife to support herself ought to be taken into account. She should not be in a better position after the decree

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(e) [1862] 31 L.J. (P.M.A.) 82.

(f) [1863] 32 L.J. (P.M.A.) 144.

(g) [1862] 31 L.J. (P.M.A.) 144.

(h) [1862] 31 L.J. (P.M.A.) 166.

(i) [1861] 30 L.J. (P.M.A.) 163 (n.)

(k) [1861] 30 L.J. (P.M.A.) 162.

(l) [1896] 22 V.L.R. 267.

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than she would have been in had the marriage continued. The rule generally followed is to allot the wife one-fifth of the husband's present income.

Counsel referred to *Burrows v. Burrows* (m); *Jonas Jonas* (n); *George v. George* (o).

Woolf—The language of sec. 88 of the *Marriage Act* shows that this matter is within the discretion of the Court. The Appellate Court will not interfere with the discretion of the learned Judge below: *Sidney v. Sidney* (p). The appellant did not appeal from the order fixing alimony *pendente lite*. He is now too late; that order has been followed by Hodges. In the absence of evidence that the respondent's position has altered permanent alimony will be ordered on the basis of the amount fixed *pendente lite*: *Franks v. Franks* (q). The cases relied upon by the appellant do not apply here. The appellant can work, but will not work.

The appellant must pay his wife's costs—that is the ordinary rule: *Hanbury v. Hanbury* (r).

Davis in reply—Where according to the English practice there has been a reference to Chambers to take evidence as to a man's income on an application for alimony *pendente lite*, the Court will not disturb the finding on the application for permanent alimony.

MADDEN, C.J. The Court, in this case, has every desire to sustain the order appealed from by any reasonable legal evidence which it may regard. Nevertheless, it is bound to rely upon facts which are not only in evidence, but legally proved evidence, and it ought not to rely upon conjecture. We therefore think that in this case the appeal should be allowed, in so far that the amount of 15s. a week ordered to be paid be reduced to 10s. a week, such latter amount representing the wages which the respondent is at the present time earning, in addition to his board and lodging. For myself, having had the

(m) [1867] L.R. 1 P. & D. 554.

(n) [1896] 16 A.L.T. 201.

(o) [1867] L.R. 1 P. & D. 554.

(p) [1865] 34 L.J. (P.M.A.) 122.

(q) 31 L.J. (P.M. & A.) 25.

(r) [1894] P. 102, 315.

advantage of looking at the appellant in the witness box and summing him up, I have no doubt he could earn more than 10s. a week if he desired to, and I should also assume from the facts and surroundings of this case that he is able to pay 15s. a week to his wife. It may be, however, that I am wrong in taking that view. He may not be so promising a wage-earner as he looks. It may be that this is not a conclusion based upon proper legal evidence as to the amount of alimony he should be called upon to pay. The appellant has, it is alleged, certain expectations under the provisions of his late father's will. And, although he is said to be prevented from anticipating his interest by reason of a forfeiture clause relating thereto contained in the will, yet I have little doubt that he could, if he wished, raise money without risk of forfeiture. But, again, this is mere conjecture. Looking at the only legal evidence of his present means, we find that the appellant is earning 10s. a week, besides his board and lodging. We think it fair that the wife should get the whole of this 10s. This is all we may order, though, of course, the petitioner may at some future date apply to the Court, under sec. 88 of the *Marriage Act*, to have the amount of permanent alimony increased when the appellant comes into his fortune. As to the costs of this appeal, we see no reason to depart from the general rule in these cases—viz., that the appellant pay the petitioner's costs.

Appeal allowed. Order of Hodges, J., varied.

Solicitors for petitioner: *Westley & Dale.*

Solicitor for respondent: *S. B. Backhouse.*

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THE BANK OF VICTORIA LIMITED v. LANGLANDS FOUNDRY COMPANY LIMITED (IN LIQUIDATION).
Instruments Act 1890 (No. 1103), ss. 132, 133—Bills of sale—Debentures of trading company—Registration—Company—Floating charge—Assurance of payment—Chattels—Fixtures—Mortgagee, right of to fixtures.

A trading company issued debentures by which it charged with all property of principal and interest "all its property whatsoever and wheresoever then present and future;" the charge was to be a floating security, but so that the company should not be at liberty to create any mortgage or charge in priority to the debentures. The principal moneys secured were to become payable if default were made in payment of interest or in case an effective resolution be passed for the winding-up of the company.

The company went into liquidation and the debenture holder claimed the proceeds of the sale of certain chattels and fixtures; the liquidator resisted the claim on the ground that the debentures were bills of sale and were void for non-registration under Part VI. of the *Instruments Act 1890*.

Held by the Full Court, that the debentures were not void for such non-registration.

Per MADDEN, C.J. On the ground that Part VI. of the *Instruments Act 1890* did not apply to trading companies.

Per HOLROYD, J. On the ground that such debentures were not included in sec. 132 of Act No. 1103 as bills of sale.

The question of the right of a mortgagee to trade fixtures discussed.

SPECIAL case stated for the opinion of the Court.

The plaintiff, the Bank of Victoria Limited, sued the defendant, the Langlands Foundry Company Limited, in liquidation, claiming a declaration that it was entitled as mortgagee to the proceeds of sale of certain fixed machinery and as the holder of debentures issued by the defendant company to the proceeds of sale of certain fixed machinery and chattels of the defendant company and to the assets of the defendant company as at the date of liquidation. The following facts, *inter alia*, were agreed upon by the parties and were set out in the special case:—(1.) The plaintiff company is a company limited by shares incorporated and registered under Part I. of the *Companies Act 1890*, and carrying on business in Melbourne. (2.) The defendant company was incorporated under the *Companies Act 1864* on the 29th June 1882 as a company limited by shares under the *Companies Act 1864*. (3.) On the 27th August 1897 the defendant company went into voluntary liquidation pursuant to the requisite resolution duly passed. (4.) On the 9th September

1897, by order of the Court, the liquidation was continued under the supervision of the Court. (5.) In the year 1888 the defendant company issued a series of debentures, and prior to and at the time of the liquidation, and at all times material to this case, the plaintiff was and now is the holder for value of the whole of such series of debentures. (6.) The said debentures have not been registered as bills of sale. (7.) The defendant company was seized and possessed under the provisions of the *Lund Act* 1884 of certain land whereon it carried on its manufacturing business of ironfounders, etc., in accordance with the terms of the leases granted under the said Act. (8.) The dates of the leases were 22nd December 1884 and 17th December 1885, and were for the full term of twenty-one years from such dates respectively. (9.) The defendant company erected buildings on the said lands comprised in the leases, and erected thereon and affixed thereto certain valuable engines, boilers, plant, and things hereinafter called fixtures for the purpose of its trade and business. (10.) The leases were, subsequent to the facts set out in paragraph 9, duly transferred to the Mercantile Finance, etc., Company Limited, and such transfers were duly registered, and the memorandum of transfer of each lease was made, given, and intended to have the effect of a mortgage security to the Mercantile Finance, etc., Company for moneys advanced by that company to the defendant company, and the said leases were afterwards duly transferred for valuable consideration to the plaintiff, and such transfers were duly registered. (11.) By an indenture dated 28th June 1888, made between the Mercantile Finance, etc., Company and the defendant, it was provided that whereas the Mercantile Finance, etc., Company had advanced the sum of 25,000*l.* to the defendant, and whereas upon the treaty for the said advance it was agreed that the moneys to become due and payable under certain debentures should be collaterally secured to the mortgagee by the memorandum of transfer referred to in paragraph 10 and by the said indenture; and whereas the memorandum of transfer was made and given and was intended, together with the said indenture, to have the effect of a mortgage security, the said indenture provided that in pur-

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suance of the said agreement, and in consideration of the said advance, the mortgagor covenanted to pay the mortgagee the sum of 25,000*l.*, together with interest, subject to the proviso for redemption that if the said sum of 25,000*l.*, together with interest, was paid on the 30th June 1893, the mortgagee was to retransfer the said lands. (12.) By an indenture dated 3rd November 1893 the Mercantile Finance, etc., Company assigned to the plaintiff the sum of 25,000*l.* owing under the indenture referred to in paragraph 11, and all interest due and to grow due thereon, and the benefit of all securities for the same and due notice thereof was given to the defendant company. (13.) The defendant company has made default in the payment of the principal sum and interest within the meaning of the securities, and has gone into liquidation, and the said sum of money together with interest is still due and owing to the plaintiff company. (14.) The defendant company at all times material to this case, and at the date of liquidation, was carrying on its manufacturing business of iron-founders, etc., on its leasehold premises over which the plaintiff company held, and still holds, the said mortgage or mortgages as security for all moneys for the time being owing to it by the defendant company. On the 30th August 1897 the plaintiff company served upon the liquidator of the defendant company the notice of claim, and on the same day took possession of the said leasehold premises and of all fixtures, and thereafter it was mutually arranged between the liquidator of the defendant company and the plaintiff that the liquidator should continue in possession of the chattel property upon certain terms set out in a letter. The liquidator has since sold (with the written consent of the plaintiff) the fixtures situate on the said leasehold property for the sum of 9,000*l.* and the unattached chattels and effects for the sum of 6,000*l.* (15.) The said sums were paid to a special account to abide the event of the decision of the Court in this matter. (16.) The sum of 9,000*l.* is claimed by the plaintiff under and by virtue of the said mortgage or mortgages, as well as under and by virtue of the said debentures. (17.) At the date of the said liquidation the defendant company was also possessed of and the

liquidator now holds or is entitled to the following assets of the said company as the proceeds of the same :—

- (a) Book debts due to the company, 1180*l.* 3*s.* 5*d.*
- (b) Deposits on contracts to be fulfilled by the company, 371*l.*
- (c) Cash balances, 35*l.* 10*s.* 8*d.*
- (d) One-third of calls made but unpaid on 9490 shares, which represents an amount of 2633*l.* 5*s.* 10*d.*

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The questions for the opinion of the Court are :—

- (A) Whether the plaintiff is entitled to the said sum of 6,000*l.*
- (B) Whether the plaintiff is entitled to all or any, and if so which of the assets enumerated in paragraph 17 of the case ?
- (C) Whether the plaintiff is entitled to the said sum of 9000*l.* or to any, and if so which portion thereof, or to the benefit thereof or any portion thereof, and for what period ?

The following was the form of the debentures :—

“ DEBENTURE.

“ 1. Langlands Foundry Company Limited (hereinafter called the company) will on the 30th June 1903 or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon pay to the bearer or when registered to the registered holder on presentation of this debenture the sum of 100*l.*

“ 2. The company will in the meantime pay interest thereon at the rate of 6 per centum per annum. . . .

“ 3. The company hereby charges with all such payments all its property whatsoever and wheresoever both present and future.

“ *The conditions within referred to.*

“ 1. . . . The debentures of the said series on all to rank *pari passu* as a first charge on the property hereby charged without any preference or priority one over another and the charge is to be a floating security but so that the

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company is not to be at liberty to create any mortgage or charge in priority to the said debentures.

"6. The principal moneys hereby secured shall immediately become payable under the following circumstances:—(a) If the company make default, etc. . . . (b) If an order be made or if an effective resolution be passed for the winding up of the company.

"8. A register of the debentures will be kept at the company's registered office. . . . And the register will be open at all reasonable times during business hours to the inspection of the registered holder hereof. . . ."

The leases were made part of the special case, but no point was raised in the argument or in the judgments upon the terms of the leases, so that it does not become material to this report to set the same out. There was a provision in the mortgage that if default were made the mortgagee could enter upon and take possession of the lands, hereditaments, buildings, erections, and premises, and to determine the tenancy between itself and the defendant, the deed having a provision under which the defendant should attorn and become tenant to the mortgagee.

I. A. Isaacs (A.G.) and *W. H. Moule* for the plaintiff—The *Instruments Act* 1890, Part VI., does not refer to trading companies, such trading companies being bound by the *Companies Act* to keep a register of all mortgages: *In re Standard Manufacturing Co.* (a); *In re Chaffey Bros. Ltd.* (b). In the latter case *Madden, C.J.*, following the decision in the *Standard Manufacturing* case, decided that a mortgage debenture constituting a floating charge upon the assets of an incorporated trading company does not come within the provisions of Part VI. of the *Instruments Act* 1890. The *Companies Act* 1896 (No. 1482), sec. 33, distinctly recognizes the decision in the case of *Chaffey Bros. Ltd.*, and makes provision for registration. The case of the *Standard Manufacturing Co.* was distinguished in *Great Northern Railway Co. v. Coal Co-operative Society* (c), on the ground that the decision in that case did not go so far as "to decide that no

(a) [1891] 1 Ch. 627.

(b) [1896] 21 V.L.R. 727.

(c) [1896] 1 Ch. 187.

corporation can be, under any circumstances, within the *Bills of Sale Act 1898*;" but it will be observed that that decision has never been seriously assailed, and has governed all transactions since its date. In *Read v. Joannon* (d) it was held that the *Bills of Sale Act 1878* did not apply to a debenture of an incorporated company, and the same point was decided in *Welstead Co. v. Swansea Bank Ltd.* (e). Whether or not the Act relates to trading companies, the form of debenture in this case, constituting merely a floating charge on the chattels, is not a bill of sale within the meaning of sec. 132 of the *Instruments Act 1890*. In the English Act, 41 & 42 Vict., c. 31, after the words "licenses to take possession of personal chattels as security for any debt," the following words have been added: "And also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred." These words are not in the Victorian Act, and those were the words which counsel in *Read v. Joannon* relied upon as making a debenture a bill of sale. A mere charge does not give a right to the specific property; the creditor must come to this Court to get possession: See *Standard Manufacturing Co.* (f); *Reeves v. Barlow* (g); *Brown v. Bateman* (h). A floating security is defined in the case of *Government Stock and other Securities Investment Co. v. Manila Railway Co.* (i)—as an equitable charge on the assets for the time being of a going concern, and that it was the essence of such charge that it remains dormant until the undertaking charged ceases to be a going concern. See also *Robson v. Smith* (k). As to the question of the fixtures, the plaintiff is entitled to the proceeds thereof. The case of *The Colonial Bank Ltd. v. Riley* (l), if it were open on the present appeal to attack it, could be shown to have been wrongly decided, but it may be distinguished on the ground that in this case the mortgage shows an intention to pass the right to

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(d) [1890] 25 Q.B.D. 308.

(e) [1899] 5 T.L.R. 332.

(f) [1891] 1 Ch., p. 638.

(g) [1883] 12 Q.B.D. 436

(h) [1867] L.R. 2 C.P. 272.

(i) [1897] A.C. 81.

(k) [1895] 2 Ch. 118.

(l) [1896] 22 V.L.R. 288.

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the fixtures, and whatever interest the lessee, the defendant had therein passes to the plaintiff, the mortgagee: *Southport and West Lancashire Banking Co. v. Thompson* (m); *Batchelder v. Yates* (n); *Small v. National Provincial Bank of England* (o); *Brooke v. Brooke* (p). There is a very important distinction between mortgages by assignment and those by underlease; in the case of an assignment the whole of the mortgagor's interest in the premises passes to the mortgagee and therefore he is entitled to all the mortgagor's rights in respect of the fixtures, including the right of severance of tenant's fixtures; but in the case of a mortgage by underlease the mortgagee is entitled only to the use of the fixtures for the term, and the right to sever remains in the mortgagor, unless there is a clear intention in the deed to convey the absolute interest in the fixture as well as the limited interest in the land. *Amos and Ferard on Fixtures* (3rd ed.), p. 295. This argument does not appear to have been brought forward in the case of *The Colonial Bank v. Riley*.

Counsel on this point referred to the following cases:—*Mew v. Jacobs* (q); *Ex parte Barclay* (r).

The following cases were also cited:—*Deffell v. White* (s); *Shears v. Jacobs* (t); *In re Marine Mansions Co.* (u); *Fisher on Mortgages* (5th ed), pp. 51, 52; *In re Hansard Union* (v).

Mitchell and *Cussen* for the defendant—*Prima facie* corporations would come within the terms used in the *Instrumentalities Act* 1890 as the expressions are wide enough to include them, having regard to the *Acts Interpretation Act* 1890. In the *Standard Manufacturing Company's* case be good law still; the basis of that decision does not apply here; in England at the time of the passing of the *Bills of Sale Act* provision did not exist for the registration of mortgages by trading companies but in Victoria the *Bills of Sale Act* was passed before the

(m) [1887] 37 Ch. D. 64.

(n) [1888] 38 Ch. D. 112.

(o) [1894] 1 Ch. 686.

(p) [1894] 2 Ch. 600.

(q) [1875] L.R. 7 H.L. 481.

(r) [1874] L.R. 9 Ch. 576.

(s) [1866] L.R. 2 C.P. 144.

(t) [1866] L.R. 1 C.P. 513.

(u) [1866] L.R. 4 Eq. 601.

(v) [1892] 8 T.L.R. 280.

was any such provision for trading companies : the first *Instruments Act* was 25 Vict., No. 141, passed before the coming into operation of the *Companies Act* in Victoria. The decision in the *Standard Manufacturing Company* has certainly been attacked by later decisions and by English text-book writers : See *Weir on Bills of Sale*, pp. 318-324, where all the authorities are reviewed. In the case of *Great Northern Railway Co. v. Coal Co-operative Society (w)*, Vaughan Williams, J., criticises the judgment of the Court in the *Standard Manufacturing Company*, and says that the Court did not intend to exclude companies generally from the *Bills of Sale Acts*, but those only for which other means of registration have been provided, and that learned Judge held that the debentures of a society registered under the *Industrial and Provident Societies Acts* must be registered as bills of sale. So that, as there was no provision for registering mortgages of trading companies when the original *Instruments Act* was passed, the reasoning of Vaughan Williams, J., is exactly applicable to the present case. The cases of *Deffell v. White* and *Shears v. Jacobs* clearly show that corporations were regarded as coming within the English *Bills of Sale Acts*, and a special provision was made in the later Acts excluding debentures of incorporated companies, and this special provision has not been adopted here. It is clear that a grantee of a bill of sale may be a corporation : Secs. 144, 148 of the *Instruments Act* 1890. The schedules also made provision for corporations, showing that it was the intention of the Legislature to include these bodies within the Act. The words "other assurances" in sec. 132 include debentures. A debenture gives a charge over the property ; it creates a floating security over all chattels. In *Edwards v. Edwards (x)* it was held that equitable securities on goods are bills of sale within the meaning of the Act. Mellish, L.J., at p. 297, said—"I think that any equitable security which gives a right to take possession through the agency of the Court is within the Act." That case was decided on the authority of *Ex parte Mackay (y)*. An agreement to give a bill of sale is an agreement to give "other assurances :"

(w) [1896] 1 Ch. 187.

(y) [1873] L.R. 8 Ch. 643.

(x) [1876] 2 Ch. D. 291.

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Levy v. Abercorris Slate and Slab Co. (z); *Ex parte Conning* (a). A bill of sale includes an equitable assurance of personal chattels. *Perl v. Richardson* (b). The section includes assurance and licenses to seize, and assurances of future chattels was one of the principal objects aimed at; the debenture gives a right coupled with an interest, and is an assurance. All the English authorities show that equitable assurances were within the earlier Act. *Marine Mansions Co.* (c); *Stockton Iron Co.* (d). Counsel referred on this point to the following cases:—*Jenkinson v. Brandley Mining Co.* (e); *Marsden v. Meadows* (f); *Campbell v. McNamara* (g); *Topham v. Greenside Glazed Firebrick Co.* (h). As to the point relating to the fixtures, this Court is bound by the decision in *The Colonial Bank Ltd. v. Riley*, which followed the case of *Southport and West Lancashire Banking Co. v. Thompson* (i).

[HOLROYD, J. But that case was one of sub-demise and the decision is based on that ground right through.]

The mortgagee does not acquire a right to the proceeds of the sale of the fixtures. Amos and Ferard lay down the proposition cited by the plaintiff's counsel as though the case of *Meux v. Jacobs* (k) decided that point, which was not the fact, as pointed out in the judgment in *The Colonial Bank Ltd. v. Riley*.

[HOLROYD, J. They seem to take the view that occurs to my mind as to the distinction between a mortgage by assignment and by underlease. Most of the cases relied on to support the decision in this Court were cases of sub-demise.]

Counsel referred to the following cases:—*Ex parte Daglish* (l); *Ex parte Barclay* (m); *Ex parte Brown* (n); *Paine Matthews* (o).

Isaacs in reply.

- (z) [1887] 37 Ch. D. 260.
- (a) [1873] L.R. 16 Eq. 414.
- (b) [1886] 8 A.L.T. 63.
- (c) [1867] L.R. 4 Eq. 601.
- (d) [1879] 10 Ch. D. 335.
- (e) [1887] 19 Q.B.D. 568.
- (f) [1881] 7 Q.B.D., p. 84.
- (g) [1893] 19 V.L.R. 542.

- (h) [1887] 37 Ch. D. 281.
- (i) [1887] 36 Ch. D. 64.
- (k) L.R. 7 H.L. 481.
- (l) [1873] L.R. 8 Ch. 1072.
- (m) [1874] L.R. 9 Ch. 576.
- (n) [1878] 9 Ch. D. 389.
- (o) [1885] 53 L.T. 872.

The following cases were referred to:—*In re Opera Co. Ltd.* (p); *In re Roundwood Colliery Co. Ltd.* (q); *In re Marriage Neave & Co.* (r); *In re Panama, etc., Royal Mail Co.* (s); *Cranfield v. Cranfield* (t); *In re Streatham and General Estates Co.* (u).

Cur. adv. vult.

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MADDEN, C. J. Special case stated between the parties for the opinion of this Court. The plaintiff company issued debentures in the form set out in the case. They in effect amounted to a charge in equity on all the assets of the plaintiff company, but were intended to be a floating security, which permitted the company to carry on its business as usual, disposing of its assets and replacing them with others in the usual way of business, the debenture holders having the right to treat them as immediately payable—(a) If the company made default for a period of six calendar months in payment of any interest thereby secured, and the bearer or registered holder thereof before the interest should be paid called in the principal moneys by notice in writing to the company; or (b) If an order were made or if an effective resolution were passed for winding up the company.

The defendant became the holder of all these debentures and still holds them.

By a transfer and deed of defeasance the defendant company conveyed to the Mercantile Finance and Agency Company Limited by way of mortgage certain leases which it held from the Crown of certain Crown lands for the residue of 21 years to secure the payment of the debentures already mentioned, of which the mortgagee was then the holder, with interest on the moneys represented by the said debentures, which had been advanced by the said mortgagee. And the said deed declared the moneys secured by it repayable on the like conditions on which the debentures became payable. The Mercantile Finance and Agency Company duly transferred to the plaintiff

(p) [1891] 3 Ch. 260.

(q) [1897] 1 Ch., p. 395.

(r) [1896] 2 Ch., p. 673.

(s) [1870] L.R. 5 Ch. 318.

(t) [1889] 23 L.R. Ir. 555.

(u) [1897] 1 Ch. 15.

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bank all the debentures and the leasehold land with the deed of defeasance already mentioned.

The defendant became unable to carry on its business and went into liquidation on the 27th August 1897, having previously made default in the payment of interest within the meaning of the securities. By arrangement between the liquidator of the defendant company and the plaintiff, who had given him notice of its claim, and had given up possession of the land and all on it, certain portions of the plaintiff's assets were sold, viz., certain fixtures which were situate on the leasehold land included in the mortgage for 9000*l.*, and certain unattached chattels and effects for 6,000*l.*

There are also—

- (a) Book debts due to defendant, 1180*l.* 3*s.* 5*d.*
- (b) Deposits on contracts to be fulfilled by the defendant company, 371*l.*
- (c) Cash balances in hands of the defendant, 35*l.* 10*s.* 8*d.*
- (d) One-third of calls made but unpaid on 9490 shares of defendant company, representing 2633*l.* 5*s.* 10*d.*

It is contended by the liquidator that the plaintiff cannot set against him claim the said sums, or any of them, by virtue of the said debentures which it holds, because, he says, these debentures are bills of sale and were not registered, and are, therefore, wholly void.

The first question to be considered by us is whether the contention is sound. This depends, in the first place, on the question whether in Victoria the debentures of a trading corporation are within the provisions of the *Instruments Act* 1890, Part VI. This has practically to be determined on the true interpretation of secs. 132 and 133 of that Act. The former enumerates the class of instruments which the Act proposes to operate on, as "bills of sale assignments transfers declarations of trust without transfer and other assurance of personal chattels," etc. It is with such instruments only that the Act concerns itself. The debentures in the present case give to the holders a charge in equity over the assets of the plaintiff, which involves an appeal to the Court to effectuate it. It has been

held in *In re Mackay, ex parte Jeavons* (v), in *Ex parte Conning, re Steele* (w), in *Ex parte Izard v. Cook* (x), and *Edwards v. Edwards* (y), that the above words, "or other assurance of personal chattels," might include a mere equitable charge, and to this extent the argument would have foundation.

In the next place the Act does not intend that its operation shall be universal, but only as against certain specified persons, for sec. 133 provides that bills of sale within its designation, which are not duly registered, shall be void "as against assignees in insolvency, or under any assignment for the benefit of the creditors of the grantor and any execution creditors" only. I am now speaking of secs. 132 and 133 exclusively, because the present question turns on them only, in my opinion. The Act No. 557, which is woven into the *Instruments Act* 1890 by consolidation, makes all bills of sale which it found defined in the existing Act which it amended totally void as against everyone concerned unless they complied with additional formalities prescribed by it, but it in no way whatever altered the number or kind of transactions which were included as bills of sale in the *Instruments Act* at the time it was enacted. Its general words—"no bill of sale" etc.—were cut down, in *Danby v. Askew* (z), to refer to mortgage transactions only, chiefly because no other bill of sale could be fitted to the forms in its schedules; but for the purpose of the present case we must exclude that Act altogether. Now, assuming that a debenture like those under consideration could be a bill of sale within sec. 132, is it reasonably possible, having regard to sec. 133, to say that the debentures of a corporation could have been intended to have been placed under the restrictions of the Act? It is clear that the making the unregistered instrument void "as against the grantor's assignee in insolvency or under any deed of assignment for the benefit of the grantor's creditors" cannot apply to a corporation's instrument, because corporations are not subject to the *Insolvency Act* at all. It has been frequently decided that as against a liquidator an unregistered instrument, which might

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(v) L.R. 8 Ch. 648.

(y) 2 Ch. D. 291.

(w) L.R. 16 Eq. 414.

(z) [1892] 18 V.L.R. 335.

(x) [1874] L.R. 9 Ch. 271.

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be a bill of sale within the Act, was not void: *In re The Mansions Co. (a)*; *In re Stockton Iron Furnace Co. (b)*; *In re Asphaltic Wood Pavement Co. (c)*. The only words, then, which could by any argument indicate the possibility of an intention to include the instrument of a corporation are the words "as against any execution creditor." The flimsiness of this contention, however, is demonstrated, in my opinion, by examining its effect. Supposing that a corporation debenture, unregistered as a bill of sale, were bad as against an execution creditor of the corporation, the right to contend so would be available to him so long only as the corporation remained out of liquidation, which in such circumstances would almost universally be the shortest time that it could take to get it into liquidation. The moment the corporation was in liquidation the execution creditor's execution would be stayed as a result, and then the liquidator could not contend that the debenture was bad as against an unregistered bill of sale as against him. In a word, it is admitted that *all* the creditors of the corporation could not contest the validity of the debenture, though one of such creditors having the judgment could do so, but only if the rest of the creditors would let him proceed with his execution and absorb the corporation's assets without putting it in liquidation for every creditor's benefit. This appears to me an incredible intention on the part of the Legislature—to be at pains to give the body of creditors the right, and to give a single creditor so minute and shadowy a right. The mere possibility that the words "as against an execution creditor" admit the case of a corporation as well as of an individual is, I think, a very slight argument as compared with the fact that the interest of the whole body of creditors is expressly provided for in the case of the bill of sale of an individual who becomes insolvent, and is entirely excluded in the case of a similar instrument of a corporation which goes into liquidation. It has been said that a liquidator, unlike an assignee in insolvency, represents both creditors and contributories, but he represents the creditors primarily, and he represents the contributories in a secondary way, but no more than an assignee.

(a) L.R. 4 Eq. 601.

(b) 10 Ch. D. 335.

(c) [1883] 49 L.T. 159.

in insolvency represents the insolvent in cases where a surplus of assets exists, and I cannot see any possible reason why, if the Legislature had any intention to apply the Act to corporations, it did not use apt and express words to do so. The argument is also pressed that the defendant's contention would exclude the debenture of an individual from the operation of the Act, as well as that of a corporation, but this is not so, because, assuming that such a debenture was "a bill of sale" within the Act (as I assume for the present that it might be), then it would in the case of the individual be bad as against a single creditor, or as against all the creditors under the express terms of sec. 133.

Besides, "debentures" have long been known commercially by that name as securities in common use, and as almost confined to corporations, and moreover as a class of security usually issued under circumstances which call for the utmost caution and consideration by the Legislature, having regard to the extent to which public commercial credit is involved in them. If the Legislature contemplated any interference with them, I cannot imagine that it would not have named them expressly in the Act in question instead of leaving them to depend on mere differing opinions as to whether they are within or without a very obscure and equivocal expression made more doubtful by the total inappositeness of the provisions of sec. 133 to the supposition that they are within that phrase. It is said that "a debenture" is difficult to define legally, and that therefore it may not have been expressly mentioned in sec. 132; but whatever class of obligation subtlety might hold to amount to "a debenture," it seems to me certain that if the Legislature meant to include debentures of corporations, it would have at least indicated that large, well-known class of obligation by its own name, even if it added general words also. Of course, if the inclusion of corporations' instruments under the provisions of the Act is not reasonably to be affirmed from its language, it does not much matter to look for the Legislature's reasons for omitting them; but if that inquiry be desirable, it is probable that the Legislature shared the legal presumption which universally prevailed until quite recent times that a corporation, being a mere artificial entity, was incapable of fraud, and as the

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Bills of Sale Acts both here and in England up to 1882 were intended to prevent frauds on creditors, the Legislature may have followed the usually accepted view, and so have omitted corporations from them, notwithstanding that a secret conveyance of a corporation's assets would be as much a mischief to creditors as it would be in the case of an individual.

In *In re Chaffey Bros. Ltd.* (d) I held that the Act did not apply to corporations. It is now said that this decision is not supported by authority to its full extent, even if it be so at all. I have therefore again closely examined the cases, and have at least satisfied myself that it is supported to its full extent by what may very safely be called eminently respectable authorities, even if it cannot claim, as I think it can, the support of the only authority which we are at liberty to accept in the present position of the question.

In *In re Chaffey Bros. Ltd.* I stated what appeared to me to be the answer to the argument that the word "person" in the *Instruments Act* 1890 may, by force of the *Interpretation of Acts Statute* 1890, include a corporation, and I will now repeat what I said there now.

In *In re John Welstead Ltd.* (e), Pollock, C.B., in the Queen's Bench Division, expressly and emphatically decided that the English Acts of 1854 and 1878 did not include the debentures of a corporation. Those Acts are practically the same as our *Instruments Act* 1890 for the purposes of the present argument.

In *Read v. Joannon* (f), the Court of Queen's Bench Division, Coleridge, C.J., and Wills, J., again expressly decided to the like effect. They had also to consider the effect of the later English Act of 1882; but, apart from it, they decide unmistakably to the proposition now under discussion.

In *Re The Standard Manufacturing Co. Ltd.* (g), the Court of Appeal (Lord Halsbury and Bowen, L.J.) in express terms discussed and approved of the two last cited decisions, and decided as it would I think appear to anyone, precisely to the like effect in the case before them. It is true that at the end of the judgment

(d) 21 V.L.R. 727.

(e) 5 T.L.R. 332.

(f) 25 Q.B.D. 300.

(g) [1891] 1 Ch. D. 627.

Bowen, L.J., says:—"The view that debentures like the present are not within the *Bills of Sale Act* of 1878 was that adopted by Baron Pollock in the case of *John Welstead Co. v. Swansea Bank*, and by Lord Coleridge and Mr. Justice Wills in the case of *Reud v. Joannon*. See also *Edmonds v. Blaina Furnaces Co.* and *Levy v. Abercorris Slate and Slab Co.* We agree with this view, and we think that this appeal should therefore be allowed with costs both here and below." He then proceeds:—"On the ground that the mortgages or charges of any incorporated company for the registration of which other provisions have been made by the *Companies Act* 1845 or 1862 are not within the *Bills of Sale Act*." This at first sight embarrasses the precision and generality of this decision as to the debentures of corporations, but I cannot see how the limitation to the case of corporations "for whose mortgages another process of registration was provided" can be maintained. It can only be inferred from the language of the Act itself whether corporations are meant to be included in it or not. If the language will include any corporations it will include at all events all trading corporations, and probably corporations of all kinds. In examining the probable causes which might be supposed to have influenced the Legislature to use the language which it has actually used and so to exclude corporations, as by its language it appears to have done, the argument is reasonable as an argument merely that the Legislature might have been content to leave the mortgages of the chattels of corporations to be registered in the way which in England was already provided by the *Companies Act* when the *Bills of Sale Act* was passed, and so *excluded* corporations' mortgages altogether from the *Bills of Sale Act*. If the language of the latter Act was deemed capable of *including* corporations it could not be argued that they or any of them should be *excluded* because another method of registering these mortgages was already provided in the *Companies Act*. The effect, then, would merely be that corporations would have to register their mortgages both ways.

The use of this limitation by Bowen, L.J., seems an unfortunate attaching of a mere argument to his decision, which he had already clearly expressed without such limitation earlier in

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his judgment. The origin of this reference to the existence of a provision for registering the mortgages and charges of incorporated companies in the *Companies Acts* in relation to the present question was in the judgment of Chitty, J., in *Edmonds v. The Blaina Furnaces Co. (h)* and in *Levy v. The Abercorris Slate, etc., Co. (i)*. It is plain that this learned Judge merely conjectures in these cases the existence of this provision as one of two alternative reasons which occur to him as possibly influencing the Legislature to not consider corporations' mortgages of chattels as necessary to be included within the *Bills of Sale Acts*. In the former case, after holding that the documents in question before him were "debentures," and that they were excluded from the *Bills of Sale Act* 1882 by sec. 17, which expressly excludes such instruments from its operation, he says:—"Now, ought I to put any narrow, restricted interpretation upon the term 'debentures' in this section? I see no reason why I should. I see one reason, though it may not cover all the ground, why I should not, and it is this: the two great classes of existing companies—viz., those established by Act of Parliament incorporating the *Companies Clauses Act* 1845, and those incorporated under the *Companies Act* 1862—are bound by statutory provisions to keep a register of their debentures, using finding these existing provisions for registration, *may have* con- that term in the sense already explained. The Legislature, sidered that it was not necessary to require the registration under the *Bills of Sale Acts* of the secured debentures of an incorporated company. The Legislature may have acted on this ground or *may have* taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by the *Bills of Sale Act*."

Chitty, J., repeats these words in the later case above quoted, but in both cases he is not attempting to decide that the non-inclusion of such debentures in the *Bills of Sale Acts* which he decides to be not included is limited to the debentures of corporations as to which the *Companies Acts* provided an existing system of registration, but he merely supposes the two reasons which he mentions as possible reasons in the mind of

(h) 36 Ch. D. 215, at p. 219.

(i) 37 Ch. D. 280, at p. 263.

the Legislature for having excluded the debentures of all such corporations as he was dealing with from the *Bills of Sale Acts*. I cannot see how it is possible to treat the reference to the same supposition in the judgment in *In re The Standard Manufacturing Co.* as a limitation of the exclusion of corporations generally from the *Bills of Sale Act*, but think that in that judgment, which expressly approves the much more general proposition in *Read v. Joannon* and in *John Welstead Ltd.*, the supposed reason of the Legislature has been accidentally applied so as to appear part of the decision itself.

Whether the limitation just discussed is or is not an essential part of the decision in *In re The Standard Manufacturing Co.* becomes important in the present case, because in this colony the *Companies Act* 1862, which contains the special provision for the registration of company's mortgages referred to in that limitation, was not enacted in this colony until shortly after the *Bills of Sale Act* 1862, now embodied in the *Instruments Act* 1890, Part VI.; and therefore, theoretically, the Legislature here could not have been influenced by the pre-existence of the provision above referred to to exclude the mortgages of chattels of corporations from the *Bills of Sale Act* to any extent. But the Legislature here adopted the English *Bills of Sale Act* practically *verbatim*, and, therefore, the words from which alone the intention of the Legislature can be arrived at, are the same here as they were in England, where they have been held not to include the debentures of corporations. Whatever may have been the reason for adopting those words in England their meaning is the same here as there. Still the main point which weighs with me is the inappropriateness of the language of the *Bills of Sale Act* to include the case of a corporation's mortgages of chattel property, and so the circumstance of the priority of date of our original *Bills of Sale Act* to our original *Companies Act* does not influence me much.

On the other hand there is the fact that in *Shears v. Jacobs* (k) and *Deffell v. White* (l) it was taken for granted that the mortgages of chattels of a corporation were within the *Bills of Sale Act*, and they were discussed and dealt with altogether as

(k) L.R. 1 C.P. 513.

(l) L.R. 2 C.P. 144.

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if they were so. But the present question was not brought to the attention of the Court in either case. This fact seems, however, of little weight in the presence of the circumstances that, from the time of those decisions, no debenture of a corporation seems ever to have been set aside for non-registration under the *Bills of Sale Act*, though multitudes of such instruments have certainly been issued within that period of over thirty years, and probably none of them were ever registered; and, also, in the face of the distinct decisions in *Re John Welstead Ltd.* and in *Read v. Joannon*, and in *In re the Standard Manufacturing Co.*, that these instruments are not within the Act at all.

There is also the case of the *Great Northern Railway Company v. The Coal Co-operative Society (m)*, in which Vaughan Williams, J., decides that the debentures of a society registered under the *Industrial and Provident Societies Act* in England are within the *Bills of Sale Act 1878*, and are not exempted by sec. 17 of the Act of 1882. There is an evident disposition, in the reasoning of this learned Judge, to render allegiance to the Court of Appeal in *In re The Standard Manufacturing Co.* to the least extent of what he considers its binding effect, and to disagree with it and *Read v. Joannon* and *Re John Welstead and Co. Ltd.*; but I prefer to accept these three decisions, both because they appear to me more consonant with the language and practical effect of the *Bills of Sale Act*, and because Mr. Justice Vaughan Williams's decision may perhaps be a correct exception of the debentures of corporations such as he was dealing with—friendly societies—from the general rule relating to trading corporations, though I cannot find anything in the Act relating to those societies to warrant such exception for the purpose under discussion here.

For all these reasons I am of opinion that the plaintiff bank is entitled to all the sums mentioned in the case, because the debentures and the deed covering them are not, as I think, within the *Instruments Act*, Part VI., and so are valid, notwithstanding non-registration.

There was a special objection also raised as to the item (d) in the 17th paragraph of the case. It was contended that uncalled

(m) [1896] 1 Ch. 187.

capital was not "property" within the meaning of that word in the debentures, and so was not subject to them. It is clear, however, that this item represents capital, in fact called up, but not yet paid, and therefore the objection as to it fails.

Another broad contention of the plaintiff is that the 9000*l.* in the case mentioned represents "fixtures," which were conveyed by the deed, which, with the transfers of the leases, constituted a further security to it for the moneys due on the debentures. The plaintiff as to these fixtures says that, even if its contention that the debentures are not within the *Instruments Act*, Part VI., were wrong, it has a good title under its mortgage of the leased land to these fixtures, because, although fixtures are declared to be chattels within the *Instruments Act*, Part VI., and a separate conveyance of them as such might require registration as a bill of sale, yet as they are attached to the mortgaged land they pass to the plaintiff by virtue of its mortgage of that land and so as to give it the right to hold them and to sell them if need be as against the mortgagor's assignee, or creditors, or liquidators, as the case may be, unless and until the mortgage money is repaid to it. This is the question which arose in *The Colonial Bank v. Riley* (*n*). It was decided by the majority of the Court in that case that the plaintiff's contention as to this is wrong. In that case I held a different opinion to that of the rest of the Court, and though I have again examined the law on the subject for the purposes of the present case, I remain still of the same opinion as I expressed there, following *Meux v. Jacobs* (*o*). The decision of the Court, however, is conclusive on the point, and therefore, if the matter rested on it, it would be necessary to find against the plaintiff. The result of this would be merely to compel the plaintiff to fall back on its contention that these fixtures are at the worst charged to it by the debentures, and that although these might be bills of sale requiring registration if they were the debentures of an individual, being the debentures of a corporation they are not so, and are valid though unregistered. This point I have already discussed and decided in the plaintiff's favour so far as I am concerned. I have had the advantage of

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reading the judgment of my brother Holroyd, and I cannot but feel the force of his arguments ; still I prefer to base my judgment on the grounds which I have already given rather than on that which he adopts.

The exact relation between the words at the beginning of sec. 133 and those in sec. 132 does not appear to have been hitherto defined by decision directly applied to that point, and there does certainly appear a striking limitation of the general class of document mentioned in the latter section to such as give the right to the grantee " either immediately after the making of such bill of sale or at any future time to seize or take possession of any property and effects comprised in or under subject to such bill of sale." And it looks as if that meant " such seizure or taking possession " as the grantee can make on the take of his own mere motion without the aid of the Court. Still I cannot sufficiently explain to myself the generality of the Court's view in *Ex parte Mackay*, *Re Jeavons*, and the other cases I have referred to, to enable me to arrive easily at an opinion either way at present, and so I prefer to rest my decision on the other grounds.

The questions in the case should be answered—(A) Yes. (B) All. (C) Yes, the whole.

HOLROYD, J. The first English *Bills of Sale Act*, 17 & 18 Vict., c. 36, passed in 1854, was brought into the law of Victoria with very slight alteration by our Act No. 141, which came into operation on the 18th of August 1862. Between these two statutes there is no difference material to the question which I am about to discuss. The policy of both, as expressed in the title and preamble, was to prevent frauds being committed upon creditors by the secret use of a class of written instruments transferring personal chattels, which were not delivered to the transferees but of which they were empowered to take possession. Thus the transferors were enabled to keep up the appearance of being in good circumstances, and obtain a credit which they did not deserve. There is a slight discrepancy between the preamble of the English Act and our own, from which it appears that the frauds struck at by the first we

principally frauds by creditors upon creditors. This class of instruments, shortly described in the title as "bills of sale," is defined by sec. 7 of 17 and 18 Vict., c. 36, as including "bills of sale assignments transfers declarations of trust without transfer and other assurances of personal chattels and also powers of attorney and authorities or licenses to take possession of personal chattels as security for any debt;" and then follows a catalogue of instruments which the expression is not to include. There is a redundancy of terms in this clause which is rather embarrassing. A bill of sale as known to the common law is a contract under seal whereby a man passeth the right and interest that he hath in goods and chattels. An assignment, as an instrument distinguished from an act of conveyance, is one, either under seal or not, by which a man assigns or sets over the interest he hath in anything to another. A transfer is not a technical name, excepting perhaps under the *Transfer of Land Act*; but it is used in common parlance for the instrument which transmits, as well as for the act of transmitting from one person to another the interest which a man hath in anything, and in the former sense is equivalent to assignment. Assurance is the old word for conveyance of land at common law, and when applied by analogy to goods should not have a wider significance. Declarations of trust without transfer seem to have been regarded by the draughtsmen as assurances. Strictly speaking, I think they are not; but they create, though they do not transfer or confirm, an equitable property. Possibly, as was suggested during the argument, the interests so created may have been the only equitable interests which were contemplated by the framers of the Act, but the equitable property in a chattel is capable of being assigned just as much as the legal property, and the definition is quite wide enough to include assignments of equitable interests. Simple authorities or licenses to take possession as security for a debt, unlike the other instruments enumerated, neither transfer nor create any property, but give the right to seize and hold the chattels until the debt is paid. "Personal chattels" mean, as defined by the same 7th section, goods, furniture, fixtures, and other articles capable of complete transfer by delivery. Reading the defini-

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tions by the light of the preamble, it seems to me necessarily follow that the assurances mentioned must, excluding declarations of trust, be restricted to instruments which pass the property legal or equitable in the chattels transferred with right to take possession of the chattels. Declarations of trust imply, and authorities to take possession confer expressly, the right of possession according to the trust or authority. The right to take possession may be exerciseable sooner or later, but it must be exerciseable at some time, unless the bill of sale should be previously satisfied. The fraud proscribed could never be perpetrated unless the power of seizure existed.

Sec. 1 of 17 & 18 Vict., c. 36, which directs the filing of bills of sale, enacts that "every bill of sale of personal chattels made after the passing of that Act either absolutely or conditionally or subject or not subject to any trusts *and where the grantee or holder shall have power* either with or without notice and either immediately after the making of such bill of sale or at any future time to seize or take possession of all property and effects comprised in or made subject to such bill of sale, and every schedule etc. shall together with an affidavit etc. be filed," and so forth. This section does not in my opinion limit the instruments of the class defined which are to be affected by the Act, but rather defines more clearly what instruments are comprised in that class, and if anything increases the number of them. But for the explanation afforded by sec. 1, it might have been doubted whether "bills of sale" as defined included all instruments under which the power of seizure was not immediate or could only be exercised after notice, or, having regard to the preamble, whether absolute deeds of gift were within the mischief which the Act aimed at correcting. It may perhaps be worth observing that while this section comes first in the Act, the section of definitions is the last but one, the last merely confining the operation of the Act to England. The points to which I especially desire to draw attention are these, that neither sec. 7 nor in sec. 1 is any instrument described which would create a mere equitable charge, and that in neither section do the words "take possession of" be fairly construed as getting the benefit of possession through the agency of the Court. The

words of sec. 1 are particularly strong. The instrument must be one whereby the grantee or holder shall have power to *seize or take possession* of the goods. But in fact the Court cannot properly be described as the agent of the person who seeks its assistance for the purpose of enforcing an equitable charge; nor is the receiver, when the Court appoints one, the agent of the plaintiff. If my view on either of these points is correct, then the debentures issued by the Langlands Foundry Company Limited in 1888, and of which the Bank of Victoria Limited is now holder, did not need to be registered as bills of sale under our law. The definition of bills of sale in sec. 9 of our Act No. 141, which corresponds with sec. 7 of 17 & 18 Vict., c. 36, has remained unchanged to the present day. It was repeated in sec. 63 of the *Instruments and Securities Statute* 1864, and again repeated in sec. 132 of the *Instruments Act* 1890. The definition of personal chattels has also with one exception remained unchanged, the exception being that the words "also a growing crop or growing crops of agricultural produce including perennial grass or of horticultural produce including fruit of any kind" were introduced into the definition by sec. 1 of 29 Vict., No. 280, and thence taken into the *Instruments Act* 1890. Sec. 2 of our Act No. 141, which in terms directed what bills of sale should be filed, and in those terms agreed exactly with sec. 1 of the English 17 & 18 Vict., c. 26, but which, as I think, merely explained more clearly the meaning of the expression "bills of sale," was re-enacted by sec. 56 of the *Instruments and Securities Statute* 1864, and again re-enacted by sec. 133 of the *Instruments Act* 1890, with an extension only of the time for filing, first introduced by sec. 11 of No. 557. It was decided in *Askew v. Danby (p)* that the whole of the Act No. 537, excepting sec. 11, was confined in its operation to bills of sale given by way of security. That Act contained no new definition of bills of sale, but from internal evidence it was held that its application must be so restricted. The first section of it, re-enacted by sec. 134 of the *Instruments Act* 1890, provides that no bill of sale shall be valid until filed in the manner prescribed, and shall not be filed until notice of intention to file

(p) 18 V.L.R. 335.

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it has been lodged as prescribed. Nothing indicates an intention on the part of the Legislature to enlarge in any direction the class of instruments subjected to these stringent enactments. According to the decision in *Askew v. Danby*, "bill of sale" in sec. 1 must have tacked on to it the qualifying words "given by way of security." With that qualification, it must be taken as referring to such instruments as would previously have needed registration to escape the consequences attached to the transferor's apparent ownership of the chattels. That must be the case whether sec. 2 of No. 141 modified the definition of bill of sale in sec. 9, or, as I think, only explained it.

The English Act, 17 & 18 Vict., c. 36, was repealed by the *Bills of Sale Act* 1878, 41 & 42 Vict., c. 31, which came into operation on the 1st January 1879. By the 3rd section of the new Act it was declared that it should apply to every bill of sale executed after that day, whether absolute or subject or not subject, to any trust, whereby the holder or grantee (as in the repealed Act) should have power either with or without notice, and either immediately or at any future time, to seize, and so forth. Sec. 4 added to the definition of bills of sale contained in sec. 7 of the repealed Act the following items, namely:—"Inventories of goods with receipt thereto attached or receipts for purchase-moneys of goods," which it classed as assurances; "and also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred." This last clause was inserted at the end of the list of specified instruments which the definition was to include, and apparently as a drag-net. It embraces not merely equitable assignments, but any, even the barest charge, under which no power to seize at any time would be conferred upon the grantee or holder. There is certainly a contradiction of terms between these two sections. The only way to reconcile the contradiction and to impose upon the grantee the necessity of registering an equitable charge pure and simple is to enlarge the meaning of the words "power to seize," and to interpret them as including the power of the grantee to get the Court to seize on his behalf. That is a meaning which in my opinion these words will not

properly bear, and were not intended to bear in the repealed Act, where the governing idea was the power of the grantee himself to seize. In the subsequent English Act of 1882, 45 & 46 Vict., c. 43, several important changes were made; and, amongst others, bills of sale given otherwise than by way of security were excluded from its operation; but the meaning of the expression was with that limitation retained. Considering the divergence of the later English Acts from the earliest I think that the authorities which were cited to us can only be of assistance when they bear directly upon the question what instruments were directed by that earliest Act to be registered, or contain intimations of what would have been the opinions of the Judges upon that point if it had come before them.

In 1873 it was decided that an agreement to give a bill of sale, relied upon as an equitable assignment of the goods required registration under 17 & 18 Vict., c. 36, as falling within the general description of assurances of personal chattels: *Ex parte Mackay, re Jeavons* (q); see also *Ex parte Conning, re Steele* (r). In 1876 it was held that a deed by which a debtor covenanted that if the debt was not paid on a day named certain chattels should be charged with it, and that he would when required assign them to the creditor as security, was void against another creditor of the debtor who had taken the chattels in execution, inasmuch as it had not been registered: *Edwards v. Edwards* (s). That was a judgment of the Lords Justices James and Mellish. The reasons which Lord Justice Mellish adduced for his decision were two: first, that the deed was an instrument under seal charging the goods with the debt, which His Lordship was of opinion would, even at law, if it did not pass the property in the goods, be held to give a right to the possession of them as security; and secondly, that it contained a covenant to assign the goods when required, which clearly gave an equitable title to them. It is true that His Lordship is reported as having said—"I think that any equitable security which gives a right to take possession through the agency of the Court is within the Act." If His Lordship has been accurately

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(q) L.R. 8 Ch. App. 648.

(r) L.R. 16 Eq. 414.

(s) L.R. 2 Ch. Div. 291.

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reported, and meant to imply that there was no distinction between an equitable assignment and a mere charge, his observation was at most a dictum, and not consonant with the ground which he assigned for his decision. He rested his judgment on the equitable assignment, which gives the right of taking possession to the assignee, while a mere charge does not. But I doubt if he did mean what has been suggested. Any person who has the right of possession may be driven to the Court for assistance in asserting it, but when he has asserted it to the Court possession will be his. The possession of the Court will not be disturbed. In the case of the *Standard Manufacturing Co. Ltd.* (t), which was so much discussed before us, the Lord Chancellor (Lord Halsbury) asked the question—"Has it ever been decided that under the Act of 1854 or under the Act of 1878 the debentures of a company required registration?" Counsel for the executing creditors replied—"It was never decided that they did not under *Read v. Joannon* (u), and it was the general understanding that they did." He then alluded to the definition of "bills of sale" in sec. 4 of the Act of 1878, remarking truly and forcibly that "every mode of creating a charge on personal chattels is hit at by that section." But in support of his argument he subsequently referred to the deed of covenant which in the beforementioned case of *Edwards v. Edwards* had been held to require registration under the Act of 1854, whereupon Lord Justice Fry interjected "That was not a mere charge but an agreement which would give a right to possession." In this and other cases the distinction between a mere charge and an equitable assignment, which is tantamount to an actual transfer of the chattels, has been manifestly present to the mind of the Court. It has several times recently been assumed, and judicially declared by the Courts in England, that debentures like those issued by the Langlands Foundry Company Limited would have required registration as bills of sale under the English Acts of 1878 and 1882, if those Acts had applied to the debentures of incorporated companies generally: See, for instance, *Edmonds v. Blaina Furnaces Co.* (v); *Great Northern*

(t) [1891] 1 Ch., p. 627.

(u) 25 Q.B.D. 300.

(v) 36 Ch. D. 215, 218.

Railway Co. v. Coal Co-operative Co. (w). But I know of no case, unless that of *Edwards v. Edwards* can be regarded as one, in which such an assumption has been made, or judicial declaration pronounced, with respect to the Act of 1854.

Debentures such as those of the Langlands Foundry Company were held in the Standard Manufacturing Company's case not to be within the scope of the *Bills of Sale Act* 1878, when issued by incorporated companies for the registration of whose mortgages or charges other provisions had been made by the *Companies Clauses Act* 1845, or by the *Companies Act* 1862; see, also, *Edmonds v. Blaina Furnaces Co. (ubi sup.)*; *Lery v. Abercorris Slab Co. (x)*; *Great Northern Railway Co. v. Coal Co-operative Co. (ubi sup.)*, and others. But I would point out that the circumstances in this colony were different. Our Act No. 141 preceded by nearly two years the *Companies Statute* 1864, which was the first general Act passed here for the incorporation of trading companies. I have, therefore, in forming my judgment, left out of account altogether that the Foundry Company was an incorporated company, and for the reasons assigned I think that the questions stated for the opinion of the Court should be answered in favour of the plaintiff, as follows:—(A) Yes. (B) All. (C) Yes, the whole sum.

A'BECKETT, J. I concur in the judgment of the Court as to the validity of the debentures on the ground that they are not bills of sale "by which the grantee or holder has power to seize or take possession of any property" within the meaning of sec. 133 of the *Instruments Act* 1890. The words above mentioned form no part of the definition of a bill of sale in sec. 132. Sec. 134 is on the face of it general, and would cover any bill of sale as defined by the Act whether giving power to seize or not, so that on a literal interpretation of the Act an instrument within the definition, though giving no such powers, would be void unless filed. Looking, however, to the course of legislation by the Acts which are consolidated in the Act of 1890, I am satisfied that sec. 134 was not intended to have, and

(w) [1896] 1 Ch., p. 187.

(x) 37 Ch. D. 263.

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ought not to be construed to have, this effect. The section was sec. 1 of Act No. 557 (Service's Act), and sec. 17 of that Act provided that it should be construed with and as part of Part VII. of the *Instruments and Securities Statute*, in which the law as to bills of sale was then contained. The object of Act No. 557 was to add the preliminary of notice to all documents given by way of security which already required registration as bills of sale. It was no part of its policy to impose the obligation of registration with reference to a new class of documents not requiring registration under the then existing law. I therefore think that debentures which would not have required registration under the law now contained in sec. 133 are not required to be registered by the law now contained in sec. 134.

Solicitors for plaintiff: *Moule, Hamilton & Kiddle.*Solicitors for defendant: *P. D. Phillips & Son.*

W. H. M.

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June 13,
September 5.A'Beckett, J.

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Trustee company—Power of investment—Security authorized by trust deed Fixed deposit in bank—Companies Act 1890 (No. 1074), s. 384—Trusts Act 1896 (No. 1421), s. 29 (b)—Statute of Limitations—Breach of trust—Covenant—Acquiescence by c.q.t.

Where there is an appointment to and an acceptance of a trusteeship under seal, and there is no express covenant by the trustee to do any special act or to perform any duty, no covenant to invest upon any kind of security is to be implied: *Adey v. Arnold* (2 De G. M. & G. 432). This doctrine will be held to apply even where there is a provision in the deed that the trustees shall invest upon particular named securities. No minute differences in the form in which the obligations of the trustee are expressed should be regarded, and unless something upon the face of the deed plainly shows that the trustee's execution thereof was required for some purpose beyond the acceptance of the trust the rule laid down in *Adey v. Arnold* should govern.

The lending by trustees of trust money, without fraud, on unauthorized securities is a breach of trust, which falls within sub-sec. (b) of sec. 29 of the *Trusts Act 1896* (No. 1421), and actions in respect of it must be brought by those not under disability within six years after the cause of action accrue.

If however one not under disability who is entitled to the income of the trust fund for her life, together with her infant son who is entitled thereto in remainder,

See post p. 43.

explained by Math. 99.

A'Beckett v. Matthews (1905) V.L.R. 54.

brings an action for such a breach of trust after the six years have expired the Court will in the interest of her co-plaintiff order the fund to be replaced, and she will thus gain the benefit of the income which may arise when the replaced fund is invested on authorized security ; but,

Semble, if she had acquiesced in the unauthorized investments the Court would give to the trustee any difference in income of the investment of the replaced fund over the unauthorized investment.

ACTION by Ellen Elizabeth Jane Matthews and Neville Langley, an infant, by Ellen Elizabeth Jane Matthews, his next friend, against the Trustees Executors and Agency Company Limited for a declaration that certain investments made by the company as trustee of a marriage settlement were in breach of trust.

A marriage settlement, bearing date the 12th April 1881, made in anticipation of a marriage between Ellen Elizabeth Jane Matthews, then Ellen Elizabeth Jane Plummer, with one Hector Mackenzie Langley, recited that a sum of 4,000*l.* had been paid by Ellen Elizabeth Jane Plummer to the company immediately before the execution thereof, which the company thereby acknowledged ; and it provided that she did thereby grant and assign unto the company all the distributive share, estate, and interest to which she was entitled as one of the next of kin of her father, William Plummer, an intestate, including such 4,000*l.*, and also all the distributive share to which she was entitled as one of the next of kin of her uncle Joseph Plummer, and all the share and interest to which she was entitled under a certain indenture of settlement “to have hold receive and take the said sum of 4,000*l.* and all other the premises hereinbefore expressed to be hereby granted and assigned unto and to the use of the said The Trustees Executors and Agency Company Limited according to the nature of the property upon the trusts and subject to the provisos declarations and agreements herein-after contained that is to say”—upon trust for her until the intended marriage, “and after the solemnization thereof upon trust to pay forthwith to the said Hector Mackenzie Langley the sum of 500*l.* and the trustees shall invest the residue of the said sum of 4,000*l.* and all other the moneys which shall come to their hands in respect of the capital of the shares of the said Ellen Elizabeth Jane Plummer hereinbefore expressed

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to be hereby granted and assigned at the discretion of the trustees in their names or under their control in or upon the public stocks funds or debentures of any of the Australian colonies or in or upon mortgage of freehold lands in the colony of Victoria and with power to the trustees at their discretion from time to time to vary or transpose such securities into or for others of the same or like nature and the trustees shall pay the dividends interest and income of the securities in or upon which the trust funds shall for the time being be invested to the said Ellen Elizabeth Jane Plummer during her life for her sole and separate use independently of the said Hector Mackenzie Langley and of his debts control and engagements and her receipt alone shall be a discharge for the same and she shall not have power to dispose or deprive herself of the benefit thereof by anticipation and after the death of the said Ellen Elizabeth Jane Plummer the trustees shall stand possessed of the said securities and the dividends interest and income thereof in trust for all or such one or more exclusively of the other or others of the issue of the said Ellen Elizabeth Jane Plummer born during the lives of the said Hector Mackenzie Langley and the said Ellen Elizabeth Jane Plummer or of the survivor of them" as they should jointly appoint and in default of such appointment as the survivor of them should appoint and in default of such appointment in trust for all the children or any the child of the said Ellen Elizabeth Jane Plummer who being sons should attain the age of 21 years or being daughters should attain that age or marry under that age.

The marriage was duly celebrated on the 27th April 1881, and the plaintiff, Neville Langley, was the only child of the plaintiff Ellen Elizabeth Jane Matthews, and was of the age of 14 years.

A decree *nisi*, granted on the petition of the wife, for the dissolution of her marriage with Hector Mackenzie Langley, was on the 23rd March 1891 made absolute by this Court. On the 18th July 1882 it was ordered by the Court that the marriage settlement should be varied by giving to the plaintiff, Ellen Elizabeth Jane Matthews, the same right of appointment over the property as if Hector Mackenzie Langley were then dead.

The joint power of appointment was never exercised, and the power of appointment vested in Ellen Elizabeth Jane Matthews by virtue of such order had not been exercised.

On the 10th February 1894 the plaintiff Ellen Elizabeth Jane Matthews was married to one Isaac Humphries Matthews.

On the 22nd March 1888 the defendant company invested 449*l.* 8*s.* 1*d.*, part of the residue of the moneys on fixed deposit for two years with the Australian Deposit and Mortgage Bank Limited. On 11th November 1889 the defendant company invested 550*l.* more of such moneys on fixed deposit for three years with the same bank. On the 22nd March 1890 the first deposit became payable, and the defendant company re-invested it with the same bank on fixed deposit receipt for two years.

On the 1st April 1892 an extraordinary resolution was passed for winding up the bank, and on the 12th May 1892 a new company was formed, having for its objects the purchase from the bank of the whole or a portion of its property and assets, and carrying on its business, and carrying on a general land, banking, and financial business, and other purposes.

The defendant company on the 4th October 1892 applied for and accepted deposit receipts in the new company for 449*l.* 8*s.* 1*d.*, payable in five years from 1st April 1892; 550*l.* payable in five years from 11th November 1892, in full satisfaction and discharge of the liability of the bank in liquidation. The new bank had not been able to pay interest on the deposit receipts, and their value was much below par.

The plaintiffs alleged that all these deposits were made by the defendant company in breach of its trust as trustee of the marriage settlement and claimed a declaration to that effect, and an order that the company repay to the trust estate the amounts so invested. They also claimed alternatively, Mrs. Matthews 500*l.* damages, and Neville Langley 500*l.* damages.

The defendant company alleged that it was unable to obtain investments, or, alternatively, satisfactory investments, for the moneys, and that it deposited them with the said banking company awaiting investment, and not otherwise; and it said that such company was a banking company complying with the conditions set out in sec. 384 of the *Companies Act* 1890, and

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that the deposit of the moneys was justified and authorized by such section; that it accepted the deposit receipts in the new company in good faith and in the interests of the beneficiaries under the settlement, and after careful consideration of the circumstances arising from the winding up of the old company owing to inability to pay its debts and from the sale of all its assets to the new company, and it would contend that in the circumstances it was not liable for any loss arising from the acceptance of the deposit receipts in the new company.

The defendant company also relied on the *Statute of Limitations*, 21 Jac. 1, c. 16, and on sec. 29 of the *Trusts Act* 1896. It further alleged that the deposits were made with the knowledge and approval of the plaintiff Ellen Elizabeth Jane Matthews, and in the circumstances would contend that she was not entitled to any of the relief claimed, and as particulars of such knowledge and approval said that statements of list of investments setting out the deposits were furnished to her on 31st March 1889, 31st March 1890, 16th April 1891, and 31st March 1892, and accounts showing the interest on such deposit receipts were furnished at various dates about half-yearly, and subsequently the amounts of such interest were paid to and received by her or her banker, and she used the moneys and never protested against the deposits until shortly before the action.

Irvine and Wanliss for the plaintiffs—The decision in *Swan v. The Perpetual Executors and Trustees Association of Australasia Ltd.* (a) shows that the deposits were made in breach of trust. Mrs. Matthews never consented to the investments, and in accepting the lists of investments and accounts did so not knowing her legal rights, and therefore could not be said to acquiesce so as to deprive her of her remedy. In October 1892 her solicitor, after an interview with the sub-manager of the defendant company, who referred him to sec. 384 of the *Companies Act* 1890 advised her that she would not succeed if she were to bring an action. This advice she believed to be good until the decision in *Swan v. Perpetual Trustees Executors*

(a) [1897] 23 V.L.R. 293.

and *Agency Company Limited*. As soon as she knew of her legal rights she brought this action. The case, it is submitted, does not fall within the provisions of 21 Jac. 1, c. 16, and sec. 29 of the *Trusts Act* 1896. The liability of the defendant company should be treated as arising from a breach of covenant. The company accepts the trusts of the document under seal, one of which is that it shall invest in the securities named. The period of limitation for an action for breach of a covenant under seal is 20 years. In any case the latter Act would not apply to the infant plaintiff, who eventually will be entitled to the whole of the *corpus*, and who is entitled, for his protection, to have the whole of the money put into a proper state of investment. We admit that the substituted deposit receipts in the new bank were taken in good faith and in the supposed interests of the beneficiaries.

Cussen for the defendant company—It is submitted that sec. 384 of the *Companies Act* 1890 gives power to trustee companies to deposit trust moneys by way of investment in such banking companies as are therein set forth. The case of *Swan v. The Perpetual Executors and Trustees Association of Australasia Limited* is, no doubt, to the contrary, but it is under appeal to the Privy Council. It is, however, further submitted that as the greatest difficulty was, owing to the state of the market, experienced in finding any securities of the kind referred to in the marriage settlement, the company was justified in putting the money into this bank on fixed deposit receipt, awaiting a revival in the market, for periods at the expiration of which it might be expected that such securities would be available. The evidence, it is submitted, shows that this bank was of the class referred to in the section. It did not buy or sell land after the passing of the *Trustees Companies Act* 1888 (No. 990), sec. 4, which is now sec. 384 of the *Companies Act* 1890. It is next submitted that sec. 29 of the *Trusts Act* 1890 makes the Act 21 Jac. 1, c. 16, apply to all cases of breach of trust arising from no dishonest or improper motive, and limits the right of action to all cases where the action is brought within six years of the accrual of the cause of action: *How v. Eurl*

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Winterton (b); *In re Bowden (c)*; *Darby and Bosanquet on Statutes of Limitations* (2nd ed.), p. 260; sub-sec. (b), sec. 4, the *Trustees Companies Act* 1888 (No. 990). It is also submitted that the adult plaintiff has acquiesced in the breach of trust. She knew of the deposits from the start and yet took the interest on them. She also believed it was a breach of trust, for she instructed a solicitor as to it, and his mistake as to the law could not be held to be an excuse to her, for she is supposed to know the law. No doubt such acquiescence would not bind the infant, but so far as her interest is concerned it is submitted that relief should be granted. By the time the infant becomes entitled the deposit receipts may be at par. It is therefore submitted that the judgment against the defendant company should, in no case, go further than to compel it to give security to replace the moneys when the infant becomes entitled to them.

Irvine in reply.

Cur. adv. vult.

A'BECKETT, J. The defendant is trustee of a marriage settlement executed in April 1881. Ellen Elizabeth J. Matthews, who has the life interest in the settled property and power to appoint the *corpus* to any child, is one of the plaintiffs; the other is her son, Neville Langley. In March 1888 the defendant, as trustee of the settlement, deposited a sum of 449*l.* 8*s.* 1*d.* on fixed deposit with the Australian Deposit and Mortgage Bank Limited, the settlement not authorizing this mode of investment. In November 1889 it deposited a further sum of 550*l.* with the same company. In March 1890 it redeposited the 449*l.* 8*s.* 1*d.* with the same company. In April 1892 the company got into difficulties, and was reconstructed into a new company. In October 1892 substituted receipts for the 449*l.* 8*s.* 1*d.* and 550*l.* were taken from this new company. I have admitted that this new deposit on the exchange of receipts was made in good faith, and in the supposed interest of the beneficiaries. It was a salvage operation, and if the original investments with the company had been regular, I should hold

(b) [1896] 2 Ch. 626.

(c) [1890] 45 Ch. D. 444.

defendant to have incurred no liability by the transaction of 1892. This new arrangement did not produce the income which a valid investment would have produced. Mrs. Matthews and her son bring this action, seeking to have it declared that the investments of the sums mentioned were breaches of trust, and that the defendant be ordered to reinstate the trust fund by substituting a proper investment. For the defence it has been contended that Mrs. Matthews is barred by her acquiescence, as well as by the *Statute of Limitations* and the *Trusts Act* 1896. The defence of acquiescence altogether fails on the facts. There was no approval, direct or indirect, of the unauthorized investment; on the contrary, Mrs. Matthews' solicitor called it in question, and the defendant appears to have been satisfied of its propriety. As to the *Statute of Limitations*, the plaintiff contends that the liability of the defendant should be treated as arising from breach of covenant, as the defendant was a party to the trust deed, and its seal is affixed to it. There is nothing exceptional in the form of the deed. The property is assigned to the trustee in the usual way, and it is declared that this property shall be held upon trusts, which are declared in the usual way. I take the law on this subject to be settled by *Holland v. Holland* (d), following *Adey v. Arnold* (e), which decided, as put by Giffard, L.J., that where there is an acceptance of a trusteeship under seal that does not amount to a covenant. Selwyn, L.J., after examining the deed before him, says:—"I think that both the recital and the operative part have one and the same object and effect, namely, the appointment to the trusteeship on the one hand, and the acceptance of it on the other, but that there is no express covenant to do any special act or to perform any duty, and I think that no such covenant can be implied." On the same subject Giffard, L.J., says:—"This deed, when looked at fairly, amounts to nothing more or less than the acceptance of the trusteeship under seal; that being so no covenant is to be implied, and I am satisfied that no covenant was intended." I say the same in this case. In doing so, and in my preceding observations as to the trusts being declared in the usual way, I have not forgotten Mr.

(d) [1869] L.R. 4 Ch. 449.

(e) [1852] 2 De G.M. & G. 432.

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Irvine's critical examination of the language used, and so slight departures from what may be considered the general force of phraseology. After providing for setting apart 500*l.* for her husband the deed says, "the trustee *shall* invest the residue in or upon etc. and the trustees *shall* pay the dividends unto etc." This may be a slight variation from the language which the duty of investing is ordinarily imposed, but I think that a question of this kind should not be decided by minor difference in the form in which the obligations of the trustee are expressed, and that unless something is to be found on the face of the deed which plainly shows that the trustee's execution was required for some purpose beyond the acceptance of the trust, the rule laid down in *Adey v. Arnold* should govern. I think, therefore, that no question of breach of covenant by the defendant arises in this case.

In dealing with the provisions of sec. 29 of the *Trusts Act* 1896, I follow the case of *In re Bowden (f)*. That was an action to compel a trustee and the representatives of deceased trustees to make good losses arising from negligent investment and insufficient security, and it was held that the action must be brought within six years. Lending without fraud on an unauthorized security is a similar breach of trust. I decide that this falls within sub-sec. (b) of sec. 29, and that the six years limitation applies. As the last improper investment was more than six years ago it follows that Mrs. Matthews has no right of action and judgment should be for the defendant if she sued alone. She is, however, associated with her son interested in remainder whose right to complain is not barred. In his interest I shall order the money improperly invested to be invested in accordance with the trusts of the settlement. Mrs. Matthews may be benefited by any increase in income which arises in the future from the difference between the income of the authorized and the unauthorized investment although her right of action is barred. If she had been debarred of relief on the ground of acquiescence I certainly should have given the trustees the benefit of the difference in income and have allowed them to pay her only the income as the investment acquiesced in would produce, but

(f) [1890] 45 Ch. D. 444.

the matter stands there is nothing in her conduct which should deprive her of the incidental advantage gained by the success of her co-plaintiff. I think he is entitled to have the fund placed at once in the proper condition, not merely to have security for its being placed in that condition on the death of Mrs. Matthews. Once replaced there is no reason for depriving Mrs. Matthews of her right under the settlement to the income which it produces. Declare that the investment of the two sums of 550*l.* and 449*l.* 8*s.* 1*d.* in the statement of claim mentioned was unauthorized under the trusts of the settlement therein referred to, and that the sum of 999*l.* 8*s.* 1*d.* should be invested as by the settlement authorized, and that the securities on which such authorized investment is made should be set aside and held as part of the property subject to the trusts of the said settlement. Order that such investment and setting apart be made and reasonable evidence thereof with full particulars be delivered by the defendant to the plaintiff's solicitor within two months from the date of this judgment. Declare that on such investment and setting apart and proof being given as aforesaid the receipts now representing the investment of the two sums making up 999*l.* 8*s.* 1*d.* be discharged from the trusts of the settlement, and may be dealt with by the defendant for its own benefit. Order that defendant pay to the plaintiffs their costs when taxed, less the costs incurred in relation to the witness Isaac Humphrey Matthews, whose evidence was unnecessary. Reserve liberty to any of the parties to apply as advised.

Solicitors for plaintiffs: *Lamrock, Brown & Hall.*

Solicitors for defendant company: *Davies & Campbell.*

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RAYNER v. THE AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY LIMITED.

11, *Nuisance—Negligence—Water service pipe in highway—Leak—Injury—Obligation to repair—Mortgagee in possession—Water Act 1890 (No. 1156), Part V., Division I.—Melbourne and Metropolitan Board of Works Act 1890 (No. 1197), Part II.*

The owner or occupier of premises to which a water service pipe is laid under the provisions of the *Water Act* 1890, Part V., Division I., is not in the absence of negligence on his part liable in damages for injuries sustained by a person lawfully using the highway, such injuries being due to the dangerous condition of the highway through a leakage from the service pipe.

No duty is cast upon the owner or occupier in such a case to see that the public are warned of the danger arising from an escape into the highway of water from the service pipe, even though he has had notice of the escape, provided that the escape has occurred without negligence on the part of the owner or occupier. There is no obligation cast upon him to repair the highway in such a case.

A mortgagee in possession of premises has towards the public the same duty as an owner or occupier has.

Fletcher v. Rylands (L.R. 1 Ex. 278 ; 3 H.L. 330) discussed.

APPEAL from County Court at Melbourne.

William Rayner, a carrier, issued a complaint in the County Court at Melbourne against the Australian Widows' Fund Life Assurance Society Ltd., by which he sought to recover 19*l.* 19*s.* damages for injuries caused to the plaintiff's horses and waggon by the defendants' neglect to keep in repair the water service pipe connecting certain houses and premises in the Parade, Ascot Vale, with the water main, whereby the roadway fell into a dangerous condition, and the plaintiff's horses and waggon, while being driven along the roadway on the 9th February 1897, fell into a large hole caused by the want of repair. He also claimed damages alternatively in the plaint for that "the defendant by reason of the facts above referred to created and permitted to remain in the said roadway a nuisance—to wit, a large hole," and consequent damage. The defendants were mortgagees in possession of the houses in the Parade, Ascot Vale. The action was heard on 5th, 6th, and 9th August and 5th November 1897.

It appeared from the evidence that Mrs. Sophie Koster was registered under the *Transfer of Land Act* 1890 as the proprietor of the premises. In May 1888 Mrs. Koster applied to the Secretary for Water Supply for leave to tap the main, and then

laid the service pipe in question with the consent of and in accordance with the regulations of the Board of Land and Works. The inspector of the Board at that time certified to the Board that the work was performed in a satisfactory manner, and that the material used was in accordance with the regulations of the Board. In June 1889 the service pipe was extended by Mrs. Koster in a similar manner. In February 1891 Mrs. Koster executed a mortgage of the premises to the defendant society, which was duly registered, and in full force at the time of action brought. The mortgage gave a general power of attorney to the defendant society. In February 1894 Mrs. Koster made default in payment of the interest under the mortgage, and the defendant society demanded repayment of the principal and interest, and gave notice of its intention to sell in default of payment, and in default of sale to foreclose. Mrs. Koster gave up possession of the premises about the time of this notice, and the defendant society from that time onward let the premises to tenants from time to time, collected the rents, executed repairs to the premises, effected insurances in its own name, paid rates, and in a letter put in evidence described itself as mortgagee in possession of the premises. The defendant society never expressly purported to act as the attorney for Mrs. Koster, and never consulted or informed her as to its acts, but it credited her in its accounts with the rents received, and debited her with the expenditure, which largely exceeded the receipts. The premises were unlet and vacant on and about the 8th and 9th February 1897. On 8th February 1897 a turncock in the employ of the Metropolitan Board of Works was informed of a leakage from a pipe in the highway in front of the premises above described, and he on that day went to the premises. Water was then showing on the surface of the roadway, and evidence was given that the leakage had been going on from one to three weeks, but the length of time that the water was visible on the surface of the roadway was not proved. On examination it was found that the leakage was from a small hole in the service pipe laid down by Mrs. Koster, about $\frac{1}{8}$ of an inch in size. The turncock shut off the water from the main.

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Tadgell, the agent of the appellant, drove up to the premises just about the time that the turncock had completed his service for the cause of the leakage, and the turncock handed to him notice to repair hereinafter set out. The roadway appeared to be safe on the 8th February 1897. On the 9th February 1897, at about 5 p.m., the plaintiff was passing along the roadway with his loaded waggon, and owing to the leakage from the pipe one of the wheels of the waggon fell into a hole in the roadway and the waggon was injured. The hole was 6 feet along the roadway by 3 feet 6 inches across, and about 15 inches deep. It was not clear on the evidence whether the hole was visible on the roadway at the time the respondent passed with his horses and waggon, or whether the leakage caused a cavity beneath the surface of the roadway, which surface collapsed on the horses and waggon passing over it. It was admitted at the bar that the learned Judge of the County Court took the latter view of the evidence. It appeared that Tadgell instructed a plumber to repair the pipe at about noon on the 9th February 1897, but no repairs were effected until the 10th February 1897 about 11 a.m.

By-law No. 4 of the Melbourne and Metropolitan Board of Works, made under the authority of the Acts numbered 1197, Part V., Division I., and 1197, Part II., was put in evidence and is to be found in the *Victorian Government Gazette* 1894, pages 2132, 2191, 2489. By-law No. 4 was substituted for by-law No. 3 referred to in the notice hereinafter mentioned. There was no evidence that the notices mentioned in the *Water Act* 1890, s. 459, had been published.

After hearing the evidence the learned County Court Judge found the following facts :—

1. That Tadgell was the defendant's agent to receive the notice in writing given him on 8th February 1897. This was a notice from the Melbourne and Metropolitan Board of Works that the service pipe supplying the appellant's premises in the Parade, Ascot Vale, was out of repair, calling attention to Water Supply By-law No. 3, sec. 8, and setting it out :—

"The service pipes from the main being the property of the owners or occupiers of the tenements supplied by such service pipes, the occupier (if any) and if none the owner shall upon receiving notice that his service pipe requires repairing immediately proceed to repair the same, and he shall be responsible for any loss of water or other damage which shall be caused by reason of such service pipe being leaky or otherwise out of repair or broken and in default be liable to a penalty not exceeding 5*l.*, and in the event of continuing the offence to a further penalty of 2*l.* for each day after receipt of such notice, and the Board may stop the water from flowing into such premises, either by cutting off the service pipe or otherwise as to the Board may seem fit, until the necessary repairs shall have been effected."

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The notice was signed by the secretary to the Board and by the turncock.

2. That there was no negligence on the part of defendants in not repairing the damage before 5 p.m. on 9th February.

The learned Judge reserved his decision. On 11th November 1897 he gave judgment in plaintiff's favour for 15*l.* damages. His reasons for judgment were written, and ran thus:—"In this case the plaintiff's waggon was injured through the wheel sinking into a slough in the street caused by a leakage from the service water pipe laid under the street. The defendants were mortgagees of the premises to which the service pipe belonged, and were sued alternatively as owners or mortgagees in possession of the premises. For defendants a nonsuit was applied for, and by arrangement this question was argued after the conclusion of the trial. There was a finding of fact that there was not negligence on the part of the defendants in not repairing the damage. For the plaintiff it was contended that defendants, using the highway for a purpose other than the ordinary purpose of traffic—that is, for their service pipe—had cast upon them an absolute duty to prevent injury through such user to persons using the road in the ordinary way. I do not think that the authorities support that proposition to its full extent, but I think that the circumstances were such as to demand the utmost care and vigilance on the part of the persons responsible for the service pipe. Ordinary care and absence of negligence is, I think, not enough. The finding of no negligence does not, therefore, conclude this case. In this duty I think the defendants failed. Tadgell who was defendants' agent "to look after the properties," had notice of the break in the pipe at 5 p.m. on the

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8th of February. He was at the spot, and had the opportunity of seeing that some damage had been done to the road. He should have put him on inquiry. He might have taken steps to ascertain the extent of the damage. Even assuming that he had not the right to break up the surface of the road for the purpose of repairing the road, still he could have immediately reported the state of the road to the corporation officers, and he could have posted a notice that the place was dangerous; but he did nothing either in the way of inquiry, precaution, or remedy until the next day, and even then nothing effectual. It was argued that the responsibility, if any, lay on the mortgagor or owner, not on the defendants, the mortgagees, and that the defendants were acting as the agents of the owner. No doubt the defendants' title to possession came from their mortgage, but in fact they were in possession and for their own benefit, not for the benefit of the mortgagor, and I think the liability of occupiers attach to them. Nonsuit refused. Judgment for the plaintiff for 15*l.* with costs."

From this decision the defendant society appealed.

McArthur (Guest with him) for the appellant—The defendants' responsibility for the result of the defect in the road depends on whether it made the hole, or whether it occurred through its negligence. Liability for permitting a nuisance does not exist unless there is power to abate the nuisance. The defendant is not liable, even though it created the nuisance, if it did so without negligence. There is no liability upon it as mortgagees.

[A'BECKETT, J. It was in the same position as if it had taken a transfer, and had gone into possession. It had no dominion over the property.

MADDEN, C.J., referred to *Richmond Local Board of Health v. Victorian Permanent Building, etc., Society* (a); *Macdonald, etc., South Melbourne v. Taylor* (b)].

There may be a duty to repair premises, but not a service of a pipe. There cannot be any such duty, because there is no power.

(a) [1890] 16 V.L.R. 845.

(b) [1891] 17 V.L.R. 167.

to repair: *Water Act* 1890, secs. 452, 433, 434, 458, 459, 461, 463 465, 467, and 487. The sole duty of the defendant was to take ordinary care. The Act gives authority to lay down something, not in itself dangerous, but which may become dangerous. The question is whether there is an absolute duty, or only a duty to take reasonable care. If the water escaped without our negligence no liability can arise owing to the condition of the roadway caused by that escape. We are under no obligation to repair the roadway. It was the condition of the highway that caused the injury, and that condition was not caused by any neglect on our part. We have brought water on to our land in the manner prescribed by the Act of Parliament. This Act is in itself a complete water scheme for the benefit of the whole community: *Snook v. Grand Junction, etc., Co.* (c); *Green v. Chelsea, etc., Co.* (d).

[MADDEN, C.J. If the owner of a house never took a drop of water he must pay the rate, and therefore everyone, even if no one took any water, would have to pay: Sec. 458.]

We are not mere volunteers, as was the case in *Fletcher v. Rylands* (e). We have put under the road something which the Act forces us to put.

Counsel referred to *Nichols v. Marsland* (f); *London, Brighton, etc., Railway Co. v. Truman* (g); *Vaughan v. Taff Vale Railway Co.* (h); *Topham v. Christie* (i).

(Counsel was stopped.)

Starke for the plaintiff respondent.

[MADDEN, C.J. You need not address yourself to the argument that the appellant is not in the same position as an owner or occupier of the premises.]

The judgment can be supported upon three grounds—(1) Nuisance; (2) the doctrine of *Fletcher v. Rylands*; and (3) negligence. The *Water Act* 1890 can afford no answer to the

(c) [1886] 2 T.L.R. 308.

(d) [1894] 10 T.L.R. 259.

(e) [1866] 1 Ex. 265; [1868] L.R. 3 H.L. 330.

(f) [1875] L.R. 10 Ex. 255; [1876] 2 Ex. D. 1.

(g) [1885] 11 App. Cas. 45.

(h) [1860] 5 H. & N. 679.

(i) [1879] 5 V.L.R. (L.) 306.

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third ground, but it is material upon the other two. Firstly, as to nuisance, the highway was rendered less commodious by reason of the leakage from the appellants' pipe. In fact, it was in a dangerous condition. A public nuisance was created: *Garrett on Nuisance* (1st ed.), p. 33. The respondent was injured by reason of this nuisance, and has therefore a cause of action: *Benjamin v. Storr* (k). It was the duty of the appellant to keep its pipe in such a condition that it did not become, or occasion by reason of its want of repair, a nuisance in the highway. Persons in the possession of premises must keep them in such a condition that the safety of the public is not endangered: *R. v. Watts* (l); *Chauniler v. Robinson* (m); *Gandy v. Jubber* (n) disapproved on a point immaterial to the present argument (o); *White v. Hindley, etc., Board* (p); *Tarry v. Ashton* (q) per Lush and Quain, JJ., discussed by Clerk and Lindsell, *Law of Torts* (2nd ed.), p. 376, 377; *Mayor, etc., of Buthurst v. Macpherson* (r); *Brown v. Eastern, etc., Railway Co.* (s); *Attorney-General v. Tod Heatley* (t). This duty is absolute: it is an incident of possession, and independent of the care, or want of care, on the part of the appellant. Negligence is not an ingredient of liability in such cases: *Jeffry v. Pancras Vestry* (u); *Braine v. Summers* (v); *Tarry v. Ashton* (w); *Bamford v. Turnley* (x); *Tobin v. Mayor, etc., Melbourne* (y); *Attorney-General v. Tod Heatley* (z). Cases of this description have been referred to the doctrine *res ipsa loquitur*, and the facts treated as *prima facie* evidence of negligence: *Byrne v. Boadle* (a); *Kearney v. London, Brighton, etc., Railway Co.* (b). But it is submitted that they really fall within the principle contended for, otherwise it is difficult to reconcile them with *Tarry v. Ashton*. If it be a

(k) [1874] L.R. 9 C.P. 400.

(l) [1703] 1 Salk. 357.

(m) [1849] 4 Ex. 163.

(n) [1864] 5 B. & S. 78.

(o) [1868] 9 B. & S. 15.

(p) [1875] L.R. 10 Q.B. 219.

(q) [1876] 1 Q.B.D. 314.

(r) [1879] 4 App. Cas. 256.

(s) [1889] 22 Q.B.D. 391.

(t) [1897] 1 Ch. 560.

(u) [1894] 63 L.J.Q.B. 618.

(v) [1881] 7 V.L.R. (L.) 420.

(w) [1876] 1 Q.B.D. 314.

(x) [1860] 3 B. & S. 62.

(y) [1881] 7 V.L.R. (L.) 488.

(z) [1897] 1 Ch. 560.

(a) [1863] 2 H. & C. 722.

(b) [1870] L.R. 5 Q.B. 411; [1871] L.R. 6 Q.B. 759.

mere question of negligence in such cases, then the doctrine *res ipsa loquitur* would be just as applicable to things falling in private premises and injuring persons lawfully there, but it does not appear to have been pushed to that extent. *Scott v. London and St. Katharine Docks* (c), *Welfare v. London, etc., Railway* (d), *Collis v. Selden* (e), *Firth v. Bowling Iron Co.* (f), *Crouchurst v. Amersham Burial Board* (g), *Wilson v. Newberry* (h) were also referred to. *Clerk and Lindsell, Law of Torts* (2nd ed.), pp. 376, 378, 391, contend for a still wider principle.

[MADDEN, C.J., referred to *Richardson v. Melbourne Tramway, etc., Co.* (i).]

That was a case of contract.

Secondly, this case falls within the principle laid down in *Fletcher v. Rylands* (k). It is the duty of the appellant to keep its water on its own premises at its peril. The doctrine forms part of the law of trespass and the law of nuisance. This is a duty incident to the possession of property, "and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care, or want of care, which they may take of it." *Humphries v. Cousins* (l); *Tobin v. Mayor, etc., Melbourne* (m); *Powell v. Fall* (n).

[HOOD, J. Would a person be liable if he took a water-cart into the street, and some mischievous person put a hole in the tank and let the water out, to the injury of a person passing along the street?]

No; that would be what is described in *Nichols v. Marsland* (o) as a *vis major*. The point is dealt with by Bramwell (p). See also *Boz v. Jubb* (q). *Vis major* must amount to an inevitable accident: *The Merchant Prince* (r).

(c) [1865] 3 H & C. 596.

(d) [1869] L.R. 4 Q.B. 693.

(e) [1868] L.R. 3 C.P. 495.

(f) [1878] 3 C.P.D. 254.

(g) [1878] 4 Ex. D. 5.

(h) [1871] L.R. 7 Q.B. 31.

(i) [1895] 17 A.L.T. 45.

(k) L.R. 1 Ex. 265; L.R. 3 H.L. 330.

(l) [1877] 2 C.P.D. 239, at p. 244.

(m) 7 V.L.R. (L.) 488.

(n) [1880] 5 Q.B.D. 597.

(o) L.R. 10 Ex. 255; 2 Ex. D. 1.

(p) L.R. 10 Ex., at p. 259.

(q) [1879] 4 Ex. D. 76.

(r) [1892] P. 179, at p. 188.

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[HOOD, J. Was not the use by the appellants of its premises an ordinary and reasonable user? Does not that exclude the doctrine of *Fletcher v. Rylands*? He referred to *Addison on Torts* (5th ed.), p. 338, and to *Peers v. Victorian Railways Commissioners* (s).]

No. The principle is that if water naturally rising in a person's premises escapes in the ordinary and natural user of the premises, then that person is not liable: *Fletcher v. Rylands* (t). It is not correct to say that if a person brings water artificially on to his premises, and that if it escapes in the ordinary and natural user of those premises, then he is not liable. *Wilson v. Waddell* (u) is a case of water coming naturally on to land, and so are the cases cited by Addison, and they do not support his position; and in Addison, at p. 564, there is a passage that makes to the contrary. A person is liable if waters naturally falling on his premises escape by reason of the non-natural user of his premises: *Hurdman v. North-Eastern, etc., Co.* (v). *Peers's Case* was but an application of that case.

[MADDEN, C.J. Is not the doctrine of *Fletcher v. Rylands* confined to large bodies of water which are obviously dangerous?]

No; that view is opposed to the reasoning of the class of cases which determines that persons occupying buildings in common take the risk of leakage from their common service pipes: *Carstairs v. Taylor* (w); *Ross v. Fedden* (x); *Anderson v. Oppenheimer* (y); *Gill v. Edouin* (z).

[HOOD, J., referred to *Blake v. Land, etc., Company* (a); *Garrett on Nuisance* (1st ed.), p. 123.]

The reasoning of all these cases would be unnecessary if the view just put were right. Blackburn, J., who propounded the doctrine of *Fletcher v. Rylands*, was a party to the decision

(a) [1893] 19 V.L.R. 617.

(t) L.R. 3 H.L. 330, per Lord Cairns at p. 339, and per Lord Cranworth at p. 342.

(u) [1876] 2 App. Cas. 95.

(v) [1878] 3 C.P.D. 168.

(w) [1871] L.R. 6 Ex. 217.

(x) [1872] L.R. 7 Q.B. 661.

(y) [1880] 5 Q.B.D. 602.

(z) [1894] 71 L.T. 762; [1895] 72 L.T. 579.

(a) [1887] 3 T.L.R. 667.

in *Ross v. Fedden*. The view is also opposed to the decision in *Humphries v. Cousins*.

[A'BECKETT, J. In the present case there was the whole power of the Melbourne Water Supply behind the leak, and so the escape would be obviously dangerous.

MADDEN, C.J. *Humphries v. Cousins* was a case of filthy water.]

That can make no difference in principle. The class of cases last cited establishes that; also *Snow v. Whitehead* (b). *Sutton v. Card* (c) suggests that the fact that the water is filthy does make a difference, but the case is unsatisfactory and has even been doubted by *Clerk and Lindsell, Law of Torts* (2nd ed.), p. 371.

[HOOD, J., referred to *Madras Railway Company v. Zemindar of Carvetinagarum* (d); *Pollock on Torts* (1st ed.), p. 402; and to *Blyth v. Birmingham Waterworks Company* (e); *Sharp v. Powell* (f).

The first case was one in which water was stored compulsorily, and the other two are applications of the doctrine of natural and probable consequences. As to the *Water Act*, the appellants' position is that possessors of pipes in highways are by virtue of the Act put in a better position than if the pipes were within the boundaries of their own premises. The Act, it is suggested, makes lawful what would otherwise be unlawful—namely, the laying of pipes in highways—but puts the possessors of those pipes in the same position as if they were on their own premises. The Act does not authorize anyone's water to escape into the highway, nor does it contemplate that it should so escape. The Act does not authorize a nuisance. Cases on other statutes afford little help. Each case must turn on the construction of the particular statute then in question but the burthen lies on those who seek to establish that the Legislature intended to take away private rights to show that by express words or necessary implication such an intention appears: *Metropolitan Asylum District v. Hill* (g), per Lord

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(b) [1884] 27 Ch. D. 588.

(c) [1886] W.N. 120.

(d) [1874] 30 L.T. 770.

(e) [1856] 11 Ex. 781.

(f) [1872] L.R. 7 C.P. 253.

(g) [1881] 6 App. Cas. 193.

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Blackburn, at pp. 203 and 208. The Act draws a broad distinction between the pipes of the water supply authority and the pipes of private individuals: Secs. 425, 433-436, 458, 459. The water authority has no power to repair private pipes: Secs. 433 and 455. The pipe in the present case was laid under the powers contained in sec. 459, or it was unlawfully in the roadway. The laying was permitted, but it was not compulsory, and there is no compulsion to take water. The great regard of the Legislature for the rights of the public is shown in many sections: See secs. 434-437, 460-469, 487. Sec. 463 gives to owners a power to remove their pipes, and that covers removal for the purpose of repair. Sec. 465 gives a power to repair, and sec. 487 assumes that there is power to repair, and in the interest of the public appoints a public body to regulate and enforce it. See, as to effect of this, *Montreal v. Standard, etc., Company (h)*. Sec. 469 gives the water authority supervision over the laying and alteration of pipes, but not over repairs. As to the by-laws, clause 10 creates an offence if pipes be not repaired. It does not prohibit repairs until after notice. Clauses 14-16 provide, in the interests of the public, that only competent persons shall lay, alter, or repair pipes. Clause 17 only applies when the pipes of the Board are affected, and clause 37 provides for the manner of giving notices when notices are required. There is power under the Act and by-laws for owners to investigate the state of repair of their pipes. The supervision of the water authority, if any such right of supervision exists over matters of repair, is for the benefit of the public, and certainly not for the purpose of relieving owners of liability. Unless the appellant is liable, the respondent must bear his loss himself, for the municipality is not liable: *Clarkbarry v. Mayor, etc., of South Melbourne (i)*, and it has no power to repair the pipe; and the water authority is not liable—it is not their pipe, and they have no power to repair it. The statutes under which *Snook v. Granul Junction, etc., Company (k)* and *Green v. Chelsea, etc., Company (l)* were decided do not appear in the reports. Possibly the storage of the water

(h) [1897] A.C. 527, at pp. 530, 531.

(i) [1895] 21 V.L.R. 426.

(k) 2 T.L.R. 308.

(l) 10 T.L.R. 259.

was compulsory. See *Waterworks Clauses Act* 1847, 10 and 11 Vict., c. 17, s. 53. In any case the defendants in those cases were exercising statutory powers for the benefit of the community.

Goodson v. Richardson (m) was also referred to.

As to negligence, the finding of the learned Judge supports the judgment. The water in the pipe was under the dominion and control of the appellant; it was the appellant's water in the street: *McKone v. Wood (n)*. It was the duty of the appellant to repair the damage and to warn the public of the danger arising from the escape of the water into the street.

Finally it is submitted that the learned Judge ought to have found negligence—*res ipsa loquitur*.

McArthur in reply.

[MADDEN, C.J. We will hear you on the last argument, *res ipsa loquitur*, first.]

The pipe was laid in 1888 under the supervision of the water authority, and was then certified to be a proper pipe. The respondent called no evidence as to the ordinary life of a pipe.

[MADDEN, C.J. My brother A'Beckett and I are of opinion that the evidence warrants the finding of the learned Judge. My brother Hood does not concur.]

The water in the pipe was not under our control: it was forced into the pipe; we could not prevent it or stop its escape. Sec. 433 of the *Water Act* gives power to the Board to repair. The whole jurisdiction over pipes under roads is given to the Board. It is no answer to my contention to say that there is power to repair, for there is no power to investigate. The owner of land has only a right to repair subject to the general control of the Board—*i.e.*, he has no right by himself to do so. He has to comply with the various by-laws of the Board.

[A'BECKETT, J. Under by-law 10 there is power in the Board to give notice to an owner to repair a pipe.]

That is *ultra vires*: Sec. 487. The only power to repair, so

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(m) [1874] L.R. 9 Ch. 221.

(n) [1831] 5 C. & P. 1.

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far as owners and occupiers are concerned, is as to pipes, etc., their own land : *Chapman v. Fylde Waterworks Co. (o)*.

[A'BECKETT, J. Looking at the authority given to the owner to put down a pipe and remove it, and to the Board to direct an owner to repair, is it not to be assumed that there is an implied power to break up the surface of the road in order to do this repair ?]

A power to remove does not cover removal for the purpose of repair : *Chapman v. Fylde Waterworks, etc., Co.* The whole of the *Water Act* is to be looked at. Sec. 487 merely gives the Board power to say that the owner shall repair the pipes on his own premises, so that there will not be waste. If waste occurs in a road the Board has power to repair. It is extraordinary that power should be given to put down and remove, but not to repair.

Counsel referred to *Vaughan v. Taff Vale Rly. Co. (London, Brighton, etc., Rly. Co. v. Truman (q) ; Geddis v. B. Reservoir (r) ; Green v. Chelsea Waterworks Co. (s) ; Hamlyn v. Smith Railway Co. v. Brand (t) ; Hammond v. St. Pancras Vestry (u) ; Dunn v. Birmingham Canal Co. (v) ; Metropolitan Asylums District v. Hill (w) ; Mersey Docks Trustees v. Gibbs (x) ; Victorian Woollen, etc., Co. v. Board of Land and Works (y) ; Carslake v. Shire of Caulfield (z).*

Starke (by permission) referred to *London and N.W. Ry. Co. v. Evans (a) ; Fergusson v. Union S.S. Co. (b)*. *Chapman v. Fylde Waterworks Co. (c)* shows that a person having power to repair is bound to exercise that power in the public interest. The English Act under which that case was decided contained no similar section to sec. 487.

MADDEN, C.J. There is no doubt that the Court has in

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| (o) [1894] 2 Q.B. 599. | (w) 6 App. Cas. 193. |
| (p) 5 H. & N. 465. | (x) L.R. 1 H.L. 93. |
| (q) 11 App. Cas. 45, at pp. 60, 65. | (y) [1881] 7 V.L.R. (L.) 461 at 462. |
| (r) [1878] 3 App. Cas. 430. | (z) 7 V.L.R. 560. |
| (s) 10 T.L.R. 259. | (a) [1893] 1 Ch. 16. |
| (t) [1868] L.R. 4 H.L. 171. | (b) [1884] 10 V.L.R. (L.) 279. |
| (u) [1874] L.R. 9 C.P. 316. | (c) [1894] 2 Q.B. 599. |
| (v) [1872] L.R. 8 Q.B. 42. | |

case, which is one of very exceptional importance, had all the light necessary to arrive at what appears to be the proper decision. Although it has taken considerable time to establish the exact mode of application of the case of *Fletcher v. Rylands* (d), and the cases depending upon it, still we think that time was legitimately spent, considering what would be the effect if the *Water Act* 1890 did not protect the appellant here, and that it might in that case probably have a grave responsibility cast upon it. At present we offer no opinion as to the extent to which these authorities go. For myself, I thought throughout the argument that it was very likely that the words in *Fletcher v. Rylands* which decide that a person who brings water upon his land shall be liable for any consequences which may ensue if any of that water escapes applied only to cases in which the water was in such a state that anyone naturally could know that if it did escape it would do damage.

I would also like to hear a good deal more argument as to whether, in circumstances like these, the principle of *Fletcher v. Rylands* would apply before applying it to a case like this. I was rather pressed by the case of *Humphries v. Cousins* (e), but as to that we offer no opinion at all. We nevertheless say that a consideration of *Fletcher v. Rylands* was not only warranted, but very desirable. The matter, however, which seems to make this case very special is the *Water Act* 1890. For this purpose we may assume that but for the Act the doctrine of *Fletcher v. Rylands* would apply. If, however, we look at that Act, we are confronted with the argument that a person may, under the provisions of the Act, do safely that which but for the Act he could not do without liability for damages, or without some other legal responsibility being incurred by him. The facts in this case are that the appellant's predecessor in title laid down a service pipe to connect the water in the main with his own property. In our opinion the appellant has all the legal liabilities of the person who laid down the service pipe. It is contended that, although the *Water Act* authorizes the laying down of a service pipe, it still leaves the person who does so open to liability under the doctrine of *Fletcher v. Rylands*. But

(d) L.R. 1 Ex. 278; L.R. 3 H.L. 330. (e) 4 C.P.D. 239.

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that argument is answered that it is not so—that by the *Water Act* only certain limited powers are given to private persons, and the appellant has followed these powers, and has carried them out satisfactorily—that, therefore, the appellant is by the *Act* freed from responsibility for any injury consequent upon the exercise of these powers. The respondent answers this argument by saying that the responsibility is wider. He contends that the power to put down a service pipe does not free the appellant from liability if the water escapes and causes damage. For the proposition two reasons are given—firstly, the *Act* by reasonable intendment imposes the liability of repairing the pipe whenever it gets out of repair, and, failing that, there is a liability for the consequences of disrepair; secondly, there is an express authority to repair, and by going to work in a reasonable and about fashion the appellant might have mended the pipe. Therefore, the appellant had under the *Act* a qualified control over the pipe, though not such a control as an owner of land would have in respect of a pipe of his own upon his own land, and it ought to have exercised this power for the benefit of the public. It did not do so, and water is allowed to escape. The appellant is therefore liable for the consequences of that escape. We have therefore to decide to what extent the rights of the appellant over this water pipe existed.

First of all, the *Water Act*, sec. 458, provides that if the owner of a tenement “does not lay on the water to his premises after certain notice he may notwithstanding be liable to be rated in the same manner as if it was laid on.” I do not think this liability is imposed by way of penalty, but rather that there should exist a fund out of which the Board might get its revenue. For myself, I think the words of the section are mandatory. I see nothing in the language showing that the Legislature intended to limit that imperative direction to lay on water to houses. If that be the case the appellant would be a misdemeanor to disobey the direction. It was a direction to the appellant's predecessor to lay down the service pipe which she did lay down. Having done this and notwithstanding more, neither she nor her successors in title are liable for the consequences following from the escape of water from the pipe.

But, supposing the section is not so extensive in its application as I have indicated, but is merely permissive, the question then arises as to what is the effect of the section so far as the liability of a private individual is concerned. When the owner of a house and premises has determined to lay down a pipe to connect the premises with the main service pipe, and is about to do so, sec. 459 of the *Water Act* provides that he may, after he has obtained the consent of the owners and occupiers of the ground, open up the ground between the main and his premises, and may then lay down his pipes in order to make the connection with the main. The section gives him the right, for the purpose of laying down his service pipe, of opening the "ground." The word "ground" might include a street, if the street intervened between the premises and the main. By sec. 463 it is provided that—"Any person who shall have laid down any pipe or other works or who shall have become the proprietor thereof may remove the same after having first given six days' notice in writing to the Board of his intention so to do and of the time of such proposed removal." Sec. 465 then goes on to provide that an owner or occupier "may open or break up so much of the pavement of any street as shall be between the pipe of the Board and his house building or premises and any sewer or drain therein for any such purpose as aforesaid doing as little damage as may be and making compensation for any damage done in the execution of such work. Provided always that every such owner or occupier desiring to break up the pavement of any street or any sewer or drain therein shall be subject to the same necessity of giving previous notice and shall be subject to the same control restrictions and obligations in and during the time of breaking up the same and also reinstating the same and to the same penalties for any delay in regard thereto as the Board is subject to by virtue of this Division of this Part of this Act." Then under certain circumstances the Board may cut off the supply of water to any person. The effect of the Act therefore is that authority is given to lay down and to remove service pipes, and for that purpose to break up the surface of streets. Before doing any of these things notice must be given, because for the purpose of laying

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down or of removing a service pipe the mains must be interfered with, and the Board must as a matter of course know what is being done. It seems a very reasonable contention, although unnecessary one here, that the individual has full authority over the street so as to lay down or remove a water pipe. It is so that he might remove a pipe for the purpose of repairing it. This may be so, but I do not think such a power would render the individual doing so liable for non-removal for repair. It certainly appears to be for the purpose of taking away from the individual that authority to remove it is given. A removal for repair would only be a colourable exercise of the right of removal. So far there is no express power to repair.

The by-laws would be *ultra vires* so far as opening a street for intervening ground for the purpose of repair if they provided for a case in excess of the statute. Whatever the power to remove may be this is the clear result of the authority given by the Act, that where an owner intends to lay down or to remove a pipe, whether permanently or temporarily, and to sever the connection of the premises with the main, he is equally bound to give previous notice of his intention to the Board, so that the Board may have control over him. Consequently, if a person desires to repair a service pipe he must give notice. The language of the Act is to be construed liberally, and its meaning is this, that where mischief occurs causing damage, a man must know of such mischief and of the need of repair, so that he may be able to give the necessary notice of his intention to repair. It would be absurd to contend that any man was at liberty to go once a week and break up the street in order to examine his service-pipe, and that if he did not do that he would be liable if it fell into disrepair. Unless he did so he could not know that the pipe required repair until the water showed itself on the surface. When the owner of a service pipe has knowledge of the defect, he then must give notice to the Board. On the other hand, clause 10 of the Board's by-laws provides that the Board must itself give notice to repair to the owner who fails to repair. Therefore the by-law merely provides for the case where the Board has knowledge of a defect in the pipe, and gives notice

the owner accordingly. This seems to be the principle, and if so it gets rid of most of the difficulties presented in the argument — namely, that the statute itself contemplates a liability to repair, which only arises when the person on whom the duty is cast has knowledge of the disrepair, and may only be acted upon when notice is given, based upon that knowledge. It appears in this case that the appellant had no notice or knowledge of the leak in the pipe until the 8th February, and that as soon as its agent received notice he took steps to remedy the defect. The water was cut off, and before the repair was effected the accident occurred by reason of the pre-existent but concealed leak. The *Water Act* by sec. 433 empowers the Board to open and break up the surface of a street for the purpose of putting down pipes, or of repairing, altering, or removing them. But sec. 434 provides that before the Board does break open the surface of a street it shall give notice of intention to do so to the municipal council under whose control the street is. Sec. 465 imposes upon an individual owner, who desires to exercise any right he has to break open the surface of a street, the duty of giving the same notice as is required by sec. 434 to be given by the Board to the municipal authority. Therefore the intention of the Act appears to be plain to give a right, if any occasion arises, to an individual to lay down a pipe in the street, and when once the pipe is laid down there is a duty to repair imposed upon the individual on notice and upon knowledge of the disrepair only. That being so, the case is disposed of. The appellant had no knowledge and no notice of the defect in the pipe, and therefore the damage which occurred is not damage for which the appellant is legally responsible. The appeal will therefore be allowed with costs, and judgment entered for the appellant.

A'BECKETT, J. The contention on behalf of the respondent in this case is that, on the principle of *Fletcher v. Rylands*, the appellant is responsible for the injury caused to the road by leakage of its pipe, although the fact that the pipe was leaking was not known, and could only have been discovered by opening up the street. This argument involves the view that, supposing

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the accident to have occurred before any notice was given, appellant would, on the authority of this case, have been responsible for it. There is much in that authority, and in the position of the appellant, to justify this extreme view. The water which the appellant took under its control is dangerous. The fact that the leakage was not discovered, in so far as any question of negligence is involved, cannot ordinarily be urged as a reason for escaping from liability caused by the leakage. In *Fletcher v. Rylands* the existence of the cause of the mischief was unknown to the defendant. There was no real negligence in the ordinary sense of the term, but there was legal responsibility. Although in this respect the authorities that have been referred to appear to fix the liability, none of them go to the extent of holding the person having within his control this water is legally an absolute insurer against any accident which may happen through the escape of that which is under his control. It is said that, under all circumstances, he would become an insurer, and, therefore, responsible for any damage resulting. But a duty is imposed upon him, and without negligence he may be liable in the performance of that duty, and may be liable. The duty in the cases mentioned, and in this particular case, would be a duty not merely to repair when it became necessary to repair, but a duty of constant vigilance, in order to see that the necessity for repairs had not arisen. In ordinary circumstances, with reference to a pipe in a place to which a person had free access, such a duty would arise—a duty to exercise such vigilance in order to ascertain that the pipe was constantly in a fit state to hold and carry water. But here I have to consider the special position in which this pipe was laid, and whether that position, and the conditions imposed by the Legislature do not naturally and reasonably, and consistently relieve the appellant from the duty of constant vigilance. In my opinion they do. The appellant was in a position in which it would be impossible for the defendant to ascertain whether it needed repairing without doing that which the Act failed to provide means for doing. It would be a highly inconvenient and injurious right to be exercised as against the public at all times and at the pleasure of the person who had laid down the pipe—quite apart from

cost—to open a street in order to ascertain the condition of that pipe. The Legislature contemplated the pipe being in that position and made provision for regulating its repair. Under that provision specific regulations were made, imposing a duty to repair after notice was given. Speaking for myself, I should say that when the defect was obvious it would not be an answer to an action for neglect to repair to say that no notice had been received. But, at all events, a proper mode of requiring repairs to be made is provided for by the regulations and under the statute by virtue of which the pipe may be laid down. The person laying it down has no power conferred upon him to investigate the state of the pipe. Under such circumstances, therefore, I think it was wrong to hold that the same duty of constant vigilance is imposed upon the appellant as in the cases to which I have referred. To do so would be to push the principle of these cases to an unreasonable extent. It would be extending the principle to a case in which it would be in the highest degree harmful, not only to a single individual, but to the public at large. Such an extension is, I think, opposed to the statute, and there is, I think, nothing in these cases which forces us under such circumstances to say that the duty was of that extent, requiring as a matter of law that a person should do that which, as a matter of fact, he probably could not do. It is to be remembered that the learned Judge of the County Court found that there was no negligence. That finding means that the pipe was in good order when laid down, and that there was no reason for suspecting that it was otherwise until the notice was given. The learned Judge adverts in his reasons for judgment to certain things which he considered might have been done by the appellant—for example, to give a certain notice which would warn the public—to avert the consequences of the leakage of the pipe when discovered. It is not quite clear to me how far the learned Judge's mind was affected by the omission to do these things; but I think that in whatever way he may have regarded the omission there was not such a duty cast upon the appellant as would subject it to an action for omitting to give a notice warning the public in the manner in which the learned Judge says the appellant might have been expected to give it when it

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was informed of the injury to the pipe. I wish to add while concurring in the judgment of the Court, I do not dissent upon the view that the principle laid down in the case of *Fletcher v. Rylands* would have no application to the case of a leaking pipe. I am guided by the statutory conditions under which this pipe was laid down.

HOOD, J. Nothing was done in this case by the appellant or its predecessor in title but what was authorized by the *Water Act*, and no neglect has been proved, yet it is contended that the appellant is liable. If that is so, the liability must rest upon the principle that a man who brings a dangerous thing upon his land must keep it there at all hazards. I do not think that obligation exists in cases where the person to whom it is sought to make liable has no legal control over the dangerous thing, but I agree with the view that the *Act* affords an answer to the action. The Legislature must be taken to have known that the water in the pipe was a dangerous thing and yet it has given authority to put that dangerous thing under the road without giving to the person who puts it there the power to look after it and see that it does not escape. If being so, the only fair meaning to give to the *Act* is that it affords protection to a person who lays down a water pipe. The person is not guilty of negligence. To hold otherwise would be to say that a person against whom an action is brought for the escape of water from a pipe so laid has no means of protecting himself.

Appeal allowed with costs.

Solicitors for appellant : *Eggleston & Derham.*
 Solicitor for respondent : *C. J. MacFarlane.*

R. H.

IN RE THE STANDARD BANK OF AUSTRALIA (IN LIQUIDATION), EX PARTE
THE CITY OF MELBOURNE BANK LIMITED (IN LIQUIDATION).

*Companies Act Amendment Act 1892 (No. 1269)—Scheme of reconstruction—Under-
taking of new company to pay liabilities of old company—Secured creditors.*

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By a scheme of reconstruction under the *Companies Acts*, a new company was formed to acquire all the assets of the old company subject to the liabilities which the new company was to discharge in a manner provided by the scheme. By clauses xii. and xiii. of the scheme every creditor of the old company, save as provided by clause xv., was to take deposit receipts and preference shares in certain proportions. By clause xv. it was provided that "Every creditor of the old company not being a creditor holding a security over any portion of the assets of the old company shall accept the provisions made for him by clauses xii. xiii. and xiv. of this scheme in satisfaction and discharge of all claims against the old company." No specific provision was made in the scheme with regard to the secured creditors, it being at the time considered that the securities were quite sufficient to cover the debts.

Held, that although the secured creditors upon finding the securities deficient could not call upon the new company to satisfy the deficiency in the manner arranged under the scheme, yet they retained their rights as mortgagees against the old company which could be enforced against the new company as the purchaser of the equity of redemption, and for this purpose the old company, if necessary, could be compelled to lend its name to enforce such rights.

Form of order.

THIS was an application by the liquidator of the City of Melbourne Bank Limited, as a creditor of the Standard Bank of Australia Limited (in liquidation), to have certain questions which had arisen in the liquidation of the Standard Bank and the City of Melbourne Bank determined by the Court.

The following were the questions contained in the notice of motion:—(1). For what amount or amounts, or on what basis is the City of Melbourne Bank Limited (hereinafter called the creditor company) entitled to claim—(a) as a secured creditor and (b) as an unsecured creditor of the above-named company (hereinafter called the old company), and in particular on what basis or as on what date or dates should its securities be valued or its claims be ascertained for such purpose or for the purpose of the questions next following? (2.) Is the creditor company on valuing its securities or otherwise entitled as an unsecured creditor of the old company, or otherwise, in respect of any and what amount, or on any and what basis, to receive any and what deposit receipts of or shares in the Stan-

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dard Bank of Australia Limited (hereinafter called the new company), or cash payments or any and what benefit under the scheme of compromise or arrangement between the old company and its creditors, as sanctioned by this Court on the 28th June 1893, and modified by the supplemental scheme sanctioned by this Court on the 6th August 1893. (3.) Is the old company or its liquidator entitled to require from the new company any and what deposit receipts, shares, or cash payments in respect of any and what part of the claim of the creditor company as aforesaid? (4.) Is the creditor company entitled to require from the old company or its liquidator that it or he shall procure for the creditor company or from the new company that it shall deliver or pay to the creditor company such deposit receipts, shares, or cash payments as aforesaid?

The affidavit of Mr. Jacomb, the liquidator of the City of Melbourne Bank, stated that the Standard Bank had gone into liquidation in 1893, and that shortly afterwards the old company entered into a scheme of compromise or arrangement with its creditors, which was duly sanctioned by the Court. The new company was duly incorporated. At the commencement of the winding-up of the old company it was largely indebted to the City of Melbourne Bank, but the latter did not prove its claim, because it was considered by both parties that the securities held by the City of Melbourne Bank were sufficient to cover the amount of its claim, and no arrangement of any kind was made. These securities have since depreciated, and Mr. Jacomb sent in a claim to the general manager of the new company, and in consequence of the difficulties raised he proceeded by way of motion to have the question decided by the Court. The scheme of compromise or arrangement between the Standard Bank and its creditors contained the following clauses *inter alia* :—

“ III. That a new company be formed with a capital of 1,000,000*l.* divided into 91,989 preference shares of 5*l.* each and 108,011 ordinary shares of 5*l.* each for the purpose (with other purposes) of acquiring all the property and assets of the old company subject to the debts and liabilities thereof the

company undertaking to pay satisfy and discharge all the liabilities of the old company in manner as hereinafter provided and also to pay the costs of"

"XII. Every creditor of the old company save as provided by clause xv. hereof shall be entitled to receive the deposit receipt of the new company for two-fifths (as near as practicable) of the amount of principal and interest owing to each creditor at the date of the registration of the new company. . . . And the principal amount of such deposit receipt shall be payable at the expiration of five years from the date of the incorporation of the new company but the new company shall have the option of paying off before maturity a rateable proportion of the amount of any deposit receipt. . . ."

"XIII. Every creditor of the old company save as provided by clause xv. hereof shall also be entitled to receive either (a) preference shares in the new company credited as fully paid up equal in nominal value to the amount of principal and interest mentioned in clause xii. hereof and not therein provided for or (b) a deposit receipt of the new company for the balance of the amount of the principal and interest. . . . *In default of notice* within the time hereinbefore fixed for exercising such option those of the creditors of the old company who were on the 28th April 1893 corporations charitable bodies without the legal power to take preference shares in the new company shall be treated as having elected to take a deposit receipt payable 10 years from the date of incorporation as aforesaid and *all other creditors of the old company shall be treated as having elected to take preference shares.*"

"XV. Every creditor of the old company not being a creditor holding a security over any portion of the assets of the old company shall accept the provisions made for him by clauses xii., xiii., xiv., of this scheme in satisfaction and discharge of all claims against the old company and shall at the time of his application for the deposit receipt of the new company deliver up to the new company to be cancelled all deposit receipts and drafts or other similar documents issued to him by the old company."

The other facts material to this report are set out in the

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judgment. The motion came on for hearing before Holroyd, J.

Weigall for the liquidator of the City of Melbourne Bank Limited—The scheme of reconstruction provided for the new company obtaining the assets of the old company subject to its liabilities. Those liabilities the new company must discharge and they included the debts owing to the secured creditors. There is nothing in the scheme which says that the secured creditors are to lose all their remedies; it does not interfere with them, it leaves their liabilities still outstanding, and the new company has undertaken to pay such liabilities. The secured creditors are bound by the scheme, but they surrender no rights.

Higgins for the Standard Bank—It would be very unjust to allow the secured creditors to step in now and take advantage of the assets which have been saved by the company under its reconstruction. The scheme contemplates that all creditors are to be bound, but the secured creditors are to get nothing except what they can realize out of their securities. Under this scheme the mode of discharging their liabilities is distinctly defined, and it expressly excludes secured creditors, and the undertaking is to discharge all liabilities in the manner provided by the scheme.

Cur. adv. vult.

HOLROYD, J. On the 28th June 1893 a scheme of compromise between the Standard Bank of Australia Limited, then in course of liquidation, and its creditors was sanctioned by the Court. By the terms of this agreement a new company was to be formed for the purpose of acquiring all the assets of the former one, subject to its liabilities, all which the new company was to undertake to discharge in manner therein provided. So far as it is necessary to state the manner indicated, it was this: Under clause xii. every creditor of the old company, save as provided by clause xv., was to be entitled to receive a deposit receipt of the new for two-fifths, as nearly as

practicable, of the amount of the principal and interest owing to such creditor at the date of registration of the new company, such deposit receipt to bear interest at a certain rate, and the principal to be payable at the expiration of five years from that date. Furthermore, by clause xiii., every creditor of the old company, save as provided by clause xv., was to be entitled to receive either preference shares in the new company, credited as fully paid up, equal in nominal value to the balance of principal and interest so owing to him, or a deposit receipt of the new company for such balance, to bear interest at a slightly lower rate, and to be payable at the expiration of 10 years from the company's incorporation. It was required that the option conferred by this clause should be exercised by the colonial creditors within one calendar month, and by the British creditors within four calendar months from the incorporation of the new company by giving notice as therein prescribed. In default of such notice, creditors not having legal power to take preference shares were to be treated as having elected to take deposit receipts, and all other creditors as having elected to take preference shares. Clause xiv. relates to the transfer of deposit receipts and the registration of the holders. From the few extracts briefly cited the main feature of the scheme of compromise appears to be that the new company should take to itself the benefit of all the assets and the burden of all the liabilities of the old. In fact, within four days after the formation of the new company, which was registered under the same name as the old on the 10th of August 1893, an agreement, a copy of which has been furnished to me, was executed, whereby the old company contracted to sell and the new company to purchase all the assets of the old company, a part of the consideration being the undertaking of the new company to discharge all the liabilities of the old in the manner provided by the scheme. Some difficulty is however occasioned by the form of the exception in clauses xii. and xiii., "save as provided by clause xv." Clause xv. runs thus:—
 "Every creditor of the old company not being a creditor holding a security over any portion of the assets of the old company shall accept the provisions made for him by clauses

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twelve thirteen and fourteen of this scheme in satisfaction and discharge of all claims against the old company etc." It is quite clear that a creditor holding any such security was obliged to accept the deposit receipts of the new company in satisfaction of his debt; but it has been contended that the scheme did not entitle him to demand them. It was urged that the generality of the words "every creditor" in clauses xiii and xiv. should be cut down by excluding creditors who held security over any portion of the assets. I am not prepared to assent to this argument, for it is quite opposed to the plain terms on which by the compromise the assets were to be taken over (that is, subject to all the liabilities), and is also opposed to the Articles of Association of the new company (article 8) and to the contract between the two companies already mentioned. On the other hand the compromise contains no reference to the valuation of securities. A secured creditor of the old company, whether his securities were sufficient or insufficient, who desired to avail himself of the means offered by the scheme for obtaining payment of his debt was bound to accept the settlement proposed as a discharge in full; and in that case he must equitably have released his securities to the new company, who took over the old liabilities in the new form. He could not, after reserving to himself the right which he possessed of realizing his securities, and upon subsequently finding them deficient, call upon the new company to satisfy the deficiency in the manner arranged for settlement of the whole amount owing to him at the time of its formation. An essential part of the scheme was that the new company should be able to ascertain, as soon as reasonably possible, the number and amount of the deposit receipts and the number of preference shares it would have to issue or allot to creditors of the old company. The secured creditor, retaining his securities, would retain also his rights as mortgagee against the old company, which could be enforced against the new as purchaser of the equity of redemption, and as having expressly covenanted to discharge the liabilities of the old. For this purpose the old company, if necessary, could be compelled to lend its name. Reverting to the actual facts of this case

appears from Mr. Jacomb's affidavit that the City of Melbourne Bank Limited, of which he is the official liquidator, and therein called the bank, was a creditor of the old company, and held securities which at the commencement of the winding up were supposed to be sufficient to cover the bank's claim, but have since depreciated in value. A large portion of these securities has been realized, and thereby the debt due to the bank has been considerably reduced. Mr. Jacomb valued the unrealized securities as on the 15th of December last at 31,400*l.* and the debt still unliquidated at 48,822*l.* 6*s.* 8*d.*, and sent in on that day to the general manager of the new company a claim for the difference. Correspondence ensued, extending over some months, and on the 26th of May of this year Mr. Jacomb wrote and requested to be informed without further delay whether the new company elected to take over the securities or to forego all interest therein. I think, as may have been anticipated from my construction of the scheme of compromise, that the bank represented by Mr. Jacomb has no power to put the new company to its election in this way; but that it may pursue any of its remedies as mortgagee—directly against the old company, and indirectly against the new, as already stated. As counsel on both sides desired that the interpretation of the scheme upon the points at issue between them should be first discussed and decided, I need say no more at present with respect to the specific questions put to me, excepting this, that taking the view which I have done it would be in some particulars impossible, and in others useless, for me to answer them as now framed. The case can be mentioned again if necessary. I have heard no argument yet as to costs. The application to the Court was made under sec. 124 of the *Companies Acts* 1890 and 1896, and therefore, strictly speaking, I can only be considered as giving advice to the liquidator of the old company, although a creditor has requested it. The new company had really no *locus standi* to intervene; but as it only appeared at the creditor's instance, and was represented by the same counsel as the old company, no difficulty can arise on this score. I shall not, however, determine how costs are to be borne until I have heard counsel on the point.

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The matter came on for further argument on 3rd August and 9th August, and the following order was made:—" . . . All parties by their counsel respectively desiring that before making any specific declaration or order as to any of the questions specifically raised by the said notice of motion herein this Court should intimate its opinion as to the proper interpretation and general effect of the scheme of compromise in such notice of motion referred to as affecting the issues raised by such questions as aforesaid this Court did reserve its judgment herein and on the 3rd August this matter standing for judgment this Court did intimate its opinion that according to the proper interpretation and general effect of the said scheme of compromise the said City of Melbourne Bank as a secured creditor of the said old company at the date of the said scheme of compromise was not entitled to avail itself of the means provided by such scheme for obtaining payment of its debts except upon terms of releasing its securities but that in the event which happened of its retaining its securities it retained also its rights and remedies as mortgagee against the old company which could be enforced indirectly if not directly against the said new company and this Court did intimate its willingness that the parties should be further heard and this matter having been mentioned . . . this Court did direct that this matter should be further heard. . . . And upon hearing Mr. Weigall of counsel for the said City of Melbourne Bank . . . there being no appearance for the said old company or its liquidator . . . this Court doth declare that the said City of Melbourne Bank in the said notice of motion referred to as the creditor company is entitled as having been a secured creditor of the old company at the date of the scheme of compromise . . . to the same rights and remedies against the new company as if the said new company had been substituted for the said old company as the debtor of the said City of Melbourne Bank as on and after the 10th August 1893 and this Court doth declare that the costs of this application of the said City of Melbourne Bank Limited or of the said R. E. Jacomb as its liquidator may be taxed and may be paid by the said R. E. Jacomb as such liquidator out of the assets of the said City of Melbourne Bank and as part of the costs charges and expenses properly incurred in the liquidation of the said City of Melbourne Bank Limited."

Solicitors for City of Melbourne Bank : *Blake & Riggall.*

Solicitors for Standard Bank : *Malleson, England & Stewart.*

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MALONEY v. THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.

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June 23, 24,
July 19.A'Beckett, J.*Unconscionable bargain—Excessive rate of interest—Bonus on loan—Delay on part of mortgagor—Mortgage.*

The plaintiff, a married woman, the wife of a carpenter, executed a deed in July 1886, to which her husband and one Marks were parties. By this deed she acknowledged that she had received 220*l.*, borrowed from Marks, and secured its repayment by an assignment of all her estate and interest under the will of her late father and any other property to which she might be entitled in expectancy, reversion, or otherwise. The mortgage also secured a bonus of 100*l.* and interest at 20*l.* per cent. per annum on the sum borrowed and the bonus, and there was a provision that the deed should be a security for any further sums which Marks might advance, with interest at the same rate. Interest was to be compounded if not paid at the period provided. The plaintiff had no solicitor acting for her or other independent advice. Her husband took the money, which was paid over on the execution of the mortgage. Afterwards the husband of the plaintiff applied from time to time for further loans, sometimes getting money and sometimes goods, the price of the latter being charged for as an advance. The husband and Marks procured the plaintiff's signature to acknowledgments, treating these further sums as advances under the deed. In June 1897 a sum of 938*l.* became receivable in respect of the plaintiff's share in her father's estate, and in May 1898 the plaintiff brought an action seeking to have the mortgage set aside, undertaking to repay the sums actually advanced, with interest at 5*l.* per cent.

Held, that this constituted an unconscionable bargain, and that the plaintiff was entitled to be relieved therefrom upon repaying the amount advanced, with interest at 6*l.* per cent.

Held also, following *James v. Kerr* (40 Ch. D., p. 460), that the charge of a bonus was illegal, and should be disallowed.

The rule of law that an excessive rate of interest will be reduced to a reasonable rate in cases of the sale of reversionary interests is applicable to cases of mortgages of such interests, though the mere fact in such latter cases that the rate of interest is excessive would not enable the person who agreed to pay it to come to the Court and successfully ask to have the rate reduced.

Held further, that the delay in taking proceedings did not bar the plaintiff, inasmuch as confirmation or acquiescence will not be presumed in cases where the reversioner continues in the same situation under the same circumstances which induced her to enter into the oppressive contract.

THIS was an action brought by the plaintiff, a married woman, against the defendant company as executor of the will of one Benjamin Marks, deceased, claiming a declaration that a certain deed dated 23rd July 1886 was void.

The plaintiff, then a married woman, aged 23, executed the deed of 23rd July 1886, to which her husband and Marks were parties, by which she acknowledged that she

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had received 220*l.*, borrowed from Marks, and secured repayment by an assignment of all her estate and interest under the will of her late father, and any other property she might be entitled to in expectancy, reversion, remainder otherwise, with a specified exception. The mortgage also secured a bonus of 100*l.*, and interest at 20*l.* per cent. on the sum borrowed and on the bonus; and provided that the deed was to be security for any further sums advanced. Interest was to be compounded if not paid at the due dates. Her husband took the money which was paid over on the execution of the deed. Further sums were advanced under circumstances set out in the judgment. The plaintiff in June 1897 became entitled to a sum of 936*l.* in respect of her share in her father's estate. The defendant contended that the plaintiff was not entitled to the relief sought; that she was estopped under the circumstances from claiming such relief; and that she was also barred by the lapse of time which had occurred. The case came on for trial before A'Beckett, J., without a jury. The further material facts are set out in the judgment.

Pigott for the plaintiff—The Court will grant relief against unconscionable bargains such as this is. The charge of 100*l.* in respect of the bonus is clearly bad: *James v. Kerr* (a). In the case *Kay, J.*, citing the case of *Jennings v. Ward* (b), where it was held that “a man shall not have interest for his money, a collateral advantage besides for the loan of it, or clog redemption with any by-agreement,” holds that principle to be still in force. The law which sets aside “catching bargains” with expectant heirs, remaindermen, or reversioners, which was made on the credit of their expectation, is applicable to cases of this kind, as well as to cases of reversionary interests: *Pollock on Contracts* (6th ed.), pp. 605, 607, and 608. Although Sir James Pollock says that an excessive rate of interest is not sufficient standing alone to invalidate a contract in equity, yet, taking into account the facts of this case, the relief sought is not dependent upon the high rate of interest, and the whole bargain must be examined—the charge of 100*l.* in respect of the bonus.

(a) [1889] 40 Ch. D., p. 459.

(b) [1705] 2 Vern. 520.

the compounding of the interest, and the fact that the plaintiff had no legal advice. Relief was granted in the case of *Chesterfield v. Janssen* (c). The poverty and ignorance of the plaintiff, and the absence of independent advice, throw upon the defendant the onus of proving the transaction was fair and reasonable: *Fry v. Lane* (d). There has been no delay on the part of the plaintiff which has prejudiced the estate of the deceased, and unless something prejudicial has occurred, the lapse of time in this case will not operate as a bar to the relief sought: *Rees v. De Bernardy* (e); *In re Garnett; Gandy v. Macaulay* (f). Counsel also cited the following cases: —*Lindsay Petroleum Co. v. Hurd* (g); *Bennett v. Tucker* (h).

Topp (with him *Maxwell*) for the defendant—The Court will not interfere with a bargain merely upon the ground that the interest is very high, or “usurious,” as it was called. The principle applicable to reversionary interests, where the Court has set aside what were termed “catching bargains with expectant heirs,” does not apply to a vested interest such as this was. The Court cannot set aside this deed; it is incumbent upon the plaintiff to establish coercion or oppression. There has been such great delay that the plaintiff should not be allowed to set up this claim; she has known of these transactions for twelve years. Relief should have been sought within a reasonable time: *Carter v. Silber* (i). In the case of *Urquhart v. M'Pherson* (k) it was held that the *Statute of Limitations* would run, not from the actual discovery of the fraud, but from the time when with due diligence the fraud might have been discovered. That will apply to the argument attacking the bonus as well as to the other charges of unfairness. There is no rule of law against the charging of compound interest.

Pigott in reply.

Cur. adv. vult.

A'BECKETT, J. In July 1886 the plaintiff, aged twenty-three, the wife of a carpenter, executed a deed to which her husband

(c) [1750] 2 Ves. 125.

(d) [1888] 40 Ch. D. 312.

(e) [1896] 2 Ch. 437.

(f) [1885] 31 Ch. D. 1.

(g) [1874] L.R. 5 P.C. 221.

(h) [1882] 8 V.L.R. (E.) 20.

(i) [1892] 2 Ch. 278.

(k) [1880] 6 V.L.R. (E.) 17.

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and one Benjamin Marks were parties, by which she acknowledged that she had received 220*l.*, borrowed from Marks, and secured its repayment by an assignment of all her estate and interest under the will of her late father, William Henry Waite, and in the matter of the trusts of Waite's settled estates and any other property to which she might be entitled in expectancy reversion, remainder, or otherwise (with a specified exception). The mortgage also secured a bonus of 100*l.* and interest at 20*l.* per cent. per annum on the sum borrowed and the bonus, and provided that the deed should be a security for any further sums of money which Marks might advance, with interest at 20*l.* per cent. Interest was to be compounded if not paid at the periods provided. The plaintiff had no solicitor acting for her or other independent adviser. Her husband took the money which was paid over when the mortgage was executed. After it was executed he applied to Marks from time to time for further loans. Sometimes he obtained money and sometimes goods, which Marks wished to get rid of, and he charged the price he put on them as an advance. He and Marks procured the wife's signature to a series of acknowledgments, treating these amounts as advances to her, to bear interest at 20*l.* per cent., under the mortgage. No interest was paid on any of the sums advanced. Marks died before anything was received under his security, and the defendant company, his executor, proved his will. In June 1897 a sum of 936*l.* became receivable in respect of the plaintiff's share in her father's estate. In May 1898, after some correspondence with the defendant's solicitors, the plaintiff brought this action, seeking to have the mortgage deed declared void and to escape from liability under the receipt which she had signed, but offering to repay the sums actually advanced to her, with interest at 5*l.* per cent. As grounds for this relief, the statement of claim alleges that the plaintiff was ignorant of business, and had no independent advice; that she did not authorize her husband to obtain further advances; and that the deed and the receipts should be declared void on the ground of unfair dealing, misrepresentation, and want of consideration. The two last grounds are unsupported by any evidence. Marks being dead, the defendant has no means

of testing the truth of the statements made to his discredit; but I feel satisfied that, even if I could have Marks's version of the facts, I should come to the conclusion that he made what the law calls an unconscionable bargain, and that the process by which the wife was induced to adopt loans and sales of goods to her husband, and treat them as advances to herself, was an injurious wasting of the wife's estate. I, nevertheless, feel that I cannot allow the plaintiff to escape the consequences of her recognition of these dealings with her husband as advances to herself. Her signature is utterly unlike that of an illiterate person, but she has sworn that she is unable to read plain writing. Even if I accepted without doubt her statement as to this, I could not as against the defendant treat her as ignorant of the contents of the documents. If she really could not read, Marks was at least entitled to assume from her signature that she could. Although I do not approve of her husband's conduct as described by himself, I cannot convict him of assisting Marks in perpetrating a series of frauds upon his wife by obtaining her signature to documents the nature of which was misrepresented. It was unwise of her to sanction the course of dealing, but it was competent for her to acknowledge the advances to her husband as advances made with her approval, and binding upon her, and Marks obtained from her what may have appeared to him to have been deliberate assent, testified by her signature. This leaves as subjects of complaint a bonus of 100*l.* on an advance of 220*l.* and compound interest at 20*l.* per cent. On the authority of *James v. Kerr* (1) I hold that the bonus was a charge which cannot be sustained. As to the excessive rate of interest, it is clear on authority that if the property over which security was given had been a reversionary interest the exorbitant charge would be reduced, and a reasonable rate substituted. The rules applicable to sales of reversionary interests are applicable to mortgages of them: See *Emmet v. Tottenham* (m); *Bromley v. Smith* (n). It is also clear that the mere fact that the rate of interest was excessive would not enable the person who agreed to pay it to come into Court and success-

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(1) 40 Ch. D., at p. 460.

(m) [1861] 10 Jur. N.S. 1090.

(n) [1859] 26 Beav. 644.

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fully ask to have the rate reduced. The property which plaintiff assigned by way of security, as set out in the statement of claim and described in the deed, does not appear to be reversionary as to the interest under the plaintiff's father's will, but the property subject to the trusts of a settled estate might have been reversionary. It appears, however, that so far as capacity for present enjoyment was concerned, the property was as unattainable by the plaintiff as if it had been reversionary. This futurity of benefit was present to the minds of the parties when the security was given. Mr. Evans, who acted as solicitor for Marks, called as a witness for the defendant, states :—"The receipt of the money was contingent on the death of Mr. W. who Mr. Marks said might live another ten or twelve years. They thoroughly understood this, and that the money could not be got for that length of time." Receipt depending on such contingency may account for the fact that nothing was obtainable until June 1897. How the delay occurred is not clear from the evidence, and I feel some doubt as to whether on the pleadings and evidence I am entitled to regard the difficulties as of such length of time which protracted realization as due to the character of the plaintiff's interest. The whole matter is less one of uncertainty. I think, however, I am not exceeding the limits laid down by authority in deciding that there is in this case such a combination of circumstances as to the position of the parties, the nature of the security given, and the means by which the sum originally secured was increased, as to justify the Court in relieving the plaintiff from the unconscionable bargain into which she entered on the terms on which relief is usually given. As to the delay in proceeding, I think the case falls within the rule that confirmation or acquiescence will be of no avail whilst the reversioner continues in the same situation as when he entered into the contract, for in such cases it has always been presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside: See *Gowland v. De Farar* (o). The advantages under which the plaintiff laboured continued until the commencement of these proceedings, and I think she did

(o) [1810] 17 Vesey 26.

ly understand her position under the documents which she signed, or receive any kind of account showing the amount not to be charged against her until after June 1897.

As to the terms upon which relief will be granted, it appears, from the rule of the Court not to give compound interest in these cases; but as the rate of interest here is higher than in England, the Court will allow 6 per cent., not 5 per cent. as in England. As stated in *Pollock on Contracts*, after reviewing the cases on this subject, the rule of the law, states the general rule to be to give no costs to either side. The charge of misrepresentation, which was not sustained, has not in any way increased the costs. Relief has in many cases been given where charges of actual fraud were made and not sustained, as in *St. Albyn v. Harding (p)*; *James v. (q)*. The circumstances affecting discretion as to costs are largely. I shall give none to either side. I think that a summary judgment will be sufficient to enable the defendant to receive what it is entitled to under its security, and will operate in favour of the plaintiff any balance of the fund in hand, and any unrealized or unascertained interest over which no security was given.

I declare that the provisions in the indenture of the 23rd day of July 1886 for a bonus of 100*l.*, for interest at 20 per cent. for compound interest, and for commission at 20 per cent. on sums advanced under the security thereby effected, are void as against the plaintiff, but that the said indenture is a valid security for 220*l.*, and for the further advances set out in paragraph 7 of the statement of claim, with interest thereon at the rate of 6 per cent. per annum from the date of the said indenture, and from the dates in such paragraph respectively until repayment.

I order that the plaintiff and defendant bear their own costs in this action up to and inclusive of this judgment. I reserve leave to either party to apply as advised.

Solicitors for plaintiff: *Price & Hargrave*.

Solicitors for defendant: *Godfrey & Godfrey*.

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[1859] 27 Beavan 11.

(q) L.R. 40 Ch. D. 460.

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August 24.
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IN RE THE STANDARD BANK OF AUSTRALIA LIMITED.

The Companies Act 1890 (No. 1074), ss. 76, 77, 78—Winding up—Petition to wind up—Directors, powers of to present petition—Articles of association, powers conferred on directors by.

Directors of a company have no general powers which authorize them upon a resolution passed at a meeting of directors to present a petition on behalf of the company to have it wound up.

By one of the articles of association it was provided—"The business of the company shall be managed by the directors, who may pay all expenses incurred in . . . registering the company, and may in addition to the powers herein conferred upon them exercise all such powers of the company as are under the *Companies Act* 1890 or under the regulations for the time being of the company required to be exercised by the company in general meeting, subject nevertheless to the regulations of the company for the time being and to the provisions of the said Act, but no new regulation of the company shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Held, that the powers conferred on the directors under this article did not empower them in their own discretion and upon their own motion to present a petition on behalf of the company to have it wound up.

THIS was a petition for the winding up of the Standard Bank of Australia Limited.

The petition was presented on behalf of the Bank itself, and the affidavit stated that at a meeting of the directors a resolution had been passed by the directors that the company should be wound up, and the petition was accordingly presented, sealed with the seal of the company. Two creditors of the company appeared upon the return of the petition. Objections were taken that the petition and the notice did not state the hour when the petition was returnable, and no date was mentioned on the petition at all. The judgment was delivered upon another point raised in the argument, and these objections were not dealt with by the Judge. The petition came on for hearing before Hodges, J.

Weigall for a creditor to oppose. (Counsel raised certain objections as to the date and hour of the return of petition not appearing on the petition)—This petition is presented by the directors of the company upon a resolution passed at a meeting of the directors, but the shareholders have never been consulted.

Directors have no power in their own discretion and upon their own motion to proceed to wind up the company. The general authority of directors is to carry on the business of the company, and not to terminate that business. Shareholders are entitled to be heard upon such an important matter, involving their interests in such a material degree. Secs. 76, 77, and 78 of the *Companies Act* 1890 make provision for winding up a company, but there is no power either expressly or impliedly given to directors to take this step without consulting the shareholders. There is no direct authority upon the question, but in the case of *The Municipal Freehold Land Company v. Ollington* (a) the general powers of directors are discussed, and they seem to be restricted to the carrying out the objects of the memorandum, i.e., carrying on the business of the company. In the case of *Smith v. Duke of Manchester* (b), Bacon, V.C., says:—"The Statute enables a company to take its own proceedings for winding-up, but there must be a meeting of the shareholders, and the shareholders would have a right to vote upon the very important question whether this company should be destroyed or not."

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Cussen for a creditor to oppose adopted the argument of Mr. Weigall.

Mitchell in support of the petition—*Prima facie* a petition presented in the name of the company by the directors is a good petition. The directors have power to manage the affairs of the company; that includes the inception, the carrying on, and the completion of the company's existence. Sec. 76 of the *Companies Act* 1890 requires under sub-sec. 1 a special resolution of the shareholders, but that resolution is not required under the other sub-sections. The directors in some instances have to take prompt action in presenting a petition, as it would be inexpedient to have to wait to call a general meeting. By the articles of association power is conferred upon the directors to do this.

[*Weigall*—The articles of association are not before the Court.]

(a) [1890] 59 L.J. Ch. 734, p. 736. (b) [1883] 24 Ch. D. 611.

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By consent the articles were made part of the exhibits, and reference made to article 128 (c). In the case of *In re The Melbourne Locomotive and Engineering Works Limited* (d) Your Honor held that similar words would give power to the directors to accept a surrender of shares. *Mr. Chadwyck Healy on Company Law* (3rd ed.), p. 554, in dealing with sec. 82 of the *English Act*, which is sec. 79 of our *Companies Act*, says that "the 'company' in that section means 'the majority of directors acting within the scope of their authority.'"

HODGES, J. This is a petition with the seal of the Standard Bank, purporting to be a petition by the Bank to be wound up. The affidavit in support of the petition states that at a meeting of the directors it was resolved that the petition should be presented, so that it appears to have been a resolution of the directors alone that the petition should be presented, and the directors thereupon signed the petition. It is objected that the directors had no power to sign such a petition, and in my opinion that objection is good. The ordinary powers of directors are powers given to them to carry on the business of the company. The whole idea of the persons who bring the company into existence is as a rule for the continuance of that company, and for the carrying on of its business, and to make profits. It is said by the directors, however, that whatever may have been their powers generally, they have power to present this petition to the Court under article 128. (His Honor read the article.) It is said those words give power to the directors to do everything that the company can do, unless there is something in the Act which restricts them or requires the company itself to do

(c) "128. The business of the company shall be managed by the directors, who may pay all expenses incurred in registering the company, and may in addition to the powers herein conferred upon them exercise all such powers of the company as are under the *Companies Act* 1890 or under the regulations for the time being of the company required to be exercised by the company in general meeting, subject nevertheless to the regulations of the company for the time being and to the provisions of the said Act. . . ."

(d) [1895] 21 V.L.R. 442.

In my opinion those words cannot be rendered in unlimited way. The article says "the business of the any shall be managed," and in construing the article words must be kept in mind. The "business of the any shall be managed"—that is, for the purpose of conducting the business of the company all these powers are given, for the purpose of destroying the company. In my opinion, the article is to be so limited, and I think that that was the view entertained by Kekewich, J., in the case of *The Municipal Council v. Ollington (e)*, where he was dealing with an article of association similar to this—in fact, virtually the same. He says:—"That might be held to imply that they gave the company for all purposes not expressly excluded by Act of Parliament or the words of the articles. But it seems to me too strong a thing to construe that as meaning that, they were exercising all the powers of the company, which means powers of effecting the objects as detailed in the memorandum of association, and working these out in detail in daily life, and that they should into the bargain be constituted the principal officers of the company as regards its agents, so as to maintain a direct communication between the company and its agents. Of course, one cannot construe general words strictly and make them mean almost nothing, but I think one ought to put a rational interpretation on them. . . ." So I understand Kekewich, J., to determine that those words, broad as they are, must be limited to acts authorised for the purpose of effecting the objects as detailed in the memorandum of association, and working that out in the daily life of the company; that does not, in my opinion, include something which is not in the contemplation of the memorandum of association, but is outside. I think the company was never intended to give them power of their own discretion to apply to have the company wound up. It seems to have been doubted, in a similar case, whether the directors had that power: *Smith v. Duke of Manchester (f)*. I think, therefore, that this petition must be dismissed. The Hon. then read another petition on behalf of the creditor

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who opposed the present petition, and dealt with the question of costs after the hearing thereof.)

Petition dismissed.

Solicitors for petitioners : *Malleson, England & Stewart.*

Solicitors for creditor : *Crisp, Cameron & Rennick.*

W. H. M.

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 September 2, 5.

[PRACTICE COURT.]

THE BANK OF AUSTRALASIA v. WHITEHEAD.

Hood, J.

Practice—"Rules of the Supreme Court 1884"—Order LXIV., r. 13—*Proceedings taken after a year—Notice of intention to proceed—Motion for a receiver—Equitable execution.*

Judgment in an action was recovered in 1894, but the judgment remained unsatisfied; in 1898 the defendant became entitled to an interest in the estate of his mother, and the plaintiff thereupon applied by way of motion, giving the usual notice, for the appointment of a receiver. An objection was taken that, as no proceedings had been taken in the cause for one year, one month's notice was necessary under Order LXIV., r. 13, before the plaintiff could proceed.

Held, that an application for a receiver was not a proceeding in the cause within the meaning of Order LXIV., r. 13.

Loneragan v. Dixon (23 V.L.R. 8) distinguished.

Judgment having been recovered in an action and the judgment to a large amount remaining unsatisfied, the plaintiff, four years afterwards, having ascertained that the defendant was entitled as one of the sons to a fourth share in his mother's intestate estate, applied by way of motion for the appointment of a receiver. Administration of the estate had not been granted. The plaintiff filed an affidavit stating that there were no other assets on which legal execution could issue, and that the defendant had no means of satisfying the judgment except through his interest in the estate of his mother.

Held, that a receiver should be appointed of the interest of the defendant in the estate.

THIS was an application by way of motion made on behalf of the Bank of Australasia for the appointment of one of its officers as a receiver of the interest of the defendant in the estate of Mary Ann Whitehead, mother of the defendant, or of so much thereof as would satisfy the judgment of the plaintiff.

The plaintiff had recovered judgment in 1894, but a large portion thereof remained unsatisfied. In 1898, the defendant's mother died intestate, and he became entitled to a share of the estate. The affidavits stated that administration

had not yet been granted, though one of the sons was preparing to make application, and that the estate was over the value of 12,000*l.*, of which the defendant would be entitled to a one-fourth share. It was also stated that there were no further assets of the defendant on which legal execution could issue, and that this interest in the said estate was the only means the defendant had of satisfying the judgment. The motion was served in the usual course, giving the usual notice.

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Pigott for the defendant—There is a preliminary objection to this application. There has been no proceeding for one year in this cause, and under Order LXIV., r. 13, it is essential that one month's notice of intention to proceed should be given. It is true that in the notes to this rule in the *Annual Practice* it is said that this rule does not apply to execution, or to any step necessary to obtain execution, but the appointment of a receiver is not an execution at all. In *Loneragan v. Dixon* (a), A'Beckett, J., held that this rule applied to proceedings to tax, so that it cannot be contended that the rule applies only to steps towards judgment. The application for a receiver is undoubtedly a proceeding in the action, and no limitation is placed upon those words in the rule.

W. H. Moule for the plaintiff in support of the motion—The provisions of Order LXIV., r. 13, apply to proceedings *towards* judgment, and not to proceedings taken afterwards, when all the issues of the action have been determined. The appointment of a receiver is called "equitable execution," and it has been decided in England that this rule does not apply to execution at all: *Taylor v. Roe* (b). In that case Kekewich, J., said that the rule only applied to proceedings *towards* judgment. In *Loneragan v. Dixon* the judgment was given with doubt, and there was every reason in that case why the other side should have ample notice to refresh his memory as to what took place at the trial, so as to prepare for the taxation proceedings, and what the learned Judge did there merely amounted to an adjournment for a fortnight. There is no reason for a month's notice in an application

(a) [1897] 23 V.L.R. 8.

(b) [1893] W.N. 26.

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like this, which has nothing to do with the action as an action, and which is merely in aid of an unsatisfied judgment.

His Honor said he would reserve his judgment upon this preliminary point, and the motion could be heard on its merits.

W. H. Moule—The Court has power to grant this mode of equitable execution: *Fuggle v. Bland* (c); *Tyrrell v. Painton* (d). There are no other assets against which legal execution can issue, and the plaintiff should be allowed to protect its interests by obtaining a receiver.

Pigott to oppose—There is not sufficient evidence to show that the plaintiff has sought to obtain satisfaction of its judgment by legal execution, and the Court must be satisfied as to this before it will grant its aid by way of ordering equitable execution: *Ettershank v. Russell* (e); *Salt v. Cooper* (f). An order should not be made until administration has been granted.

HOOD, J. As to the merits of this application, I have no hesitation in thinking it should be granted. As to the plaintiff not having exhausted its legal remedies, I think that the statement in the affidavit should satisfy me that it has done all that it could be reasonably supposed to do. It has been contended that the plaintiff should go to the useless expense of issuing execution. I do not think that that contention is right where the Court is satisfied it would be useless. Where the plaintiff states that inquiries have been made, and no assets are discoverable on which to levy, I think that is sufficient. Then it is said that it is not "just or convenient" to make the order, because the amount of the defendant's interest is not yet fixed or ascertained; but I think it is "just and convenient" that the defendant should not be allowed an opportunity of making away with that interest. All that the plaintiff asks for is an order which will prevent the debtor from parting with this interest, and that so far as it is at present unencumbered, it may

(c) [1883] 11 Q. B. D. 711.

(d) [1895] 1 Q. B. 202.

(e) [1884] 6 A. L. T. 140.

(f) [1881] 16 Ch. D. 544.

be paid to a receiver for the satisfaction of the judgment debt. That order I am prepared to make subject to my consideration of the preliminary point which I have reserved.

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Upon a subsequent day His Honor delivered the following judgment upon the preliminary objection:—

HOOD, J. The plaintiff recovered judgment against the defendant in 1894, and that judgment still remains unsatisfied to some extent. Execution was not issued, but the plaintiff has been unable to discover any assets of the defendant against which legal execution could issue. The affidavit filed on behalf of the plaintiff states that the bank has been unable to discover any assets on which legal execution could issue, and it is believed that the defendant has no means of satisfying the said judgment except through his interest in the estate of his mother, Mrs. Whitehead. That interest is the defendant's share in his mother's property, she having died in July 1898, and there being no legal means of seizing that, the plaintiff has applied on motion for the exercise of the equitable jurisdiction of this Court by way of the appointment of a receiver. This is commonly, though perhaps erroneously, known as equitable execution. Several objections were taken, with which I dealt, reserving one only, which was based upon the interpretation of Order LXIV., r. 13. (His Honor read the rule.) It is four years since judgment in this case was obtained, and it is contended on behalf of the defendant that before the plaintiff can make this application he is bound to give one month's notice of his intention to proceed. The plaintiff contends that the rule only applies to proceedings before judgment, and has no application to matters in an action arising after that—that, in fact, an action is at an end with the judgment so far as this rule is concerned. That view is strongly supported by English decisions, and if it were necessary for me absolutely to decide it, I should say that that is the view I would take. Reliance was placed by the defendant's counsel on *Lonergan v. Dixon* (g). The question was there

(g) 23 V.L.R. 8,

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in controversy, and A'Beckett, J., held that where a party proceeds to tax his costs after the lapse of one year since the last proceedings in the action, he must give one month's notice. I do not think it is necessary for me in this case to say whether I agree with that case, because I think it is distinguishable upon the ground suggested by Mr. Moule. If the decision is looked at with the argument of counsel opposing the application it is clear that the reason for that decision was the desire to give the other party a chance of knowing what was to be said against him after so long a lapse of time, and to enable him to get together his materials to oppose the taxation. The argument is put in that way, and the judgment proceeds upon that view. Giving effect to that judgment and the reasons thereof to the utmost, I think it has no application here. This is not raking up something that took place years ago. It is a dispute about matters that have just occurred. The object of giving a month's notice would not arise here; that object is simply to enable the other side to prepare materials for the fresh proceeding. Here the only result would be to enable the defendant to dispose of his interest in the subject matter, to the prejudice of the plaintiff; it would give him the opportunity of passing it away to some other person. I think therefore that the reason of the decision in *Louergan v. Dixon* does not apply to this case, and that the objection fails.

Motion granted, with costs.

Solicitors for plaintiff: *Moule, Hamilton & Kiddle.*

Solicitor for defendant: *Rymer.*

W. H. M.

SCOWN v. HAWORTH.

F.C.

Practice—New trial—Verdict of jury—Contradictory evidence—Documentary evidence—Procedure—“Rules of Supreme Court”—Order XXXIX., rr. 1, 4 September 2, 5, 7.
—New trial motion—Appeal—Notice.

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A new trial motion is not liable to dismissal by reason of the fact that the notice of motion is headed “Notice of Appeal” and is a ten-days’ notice, and asks also for an order that the judgment be set aside and a verdict and judgment be entered for the defendant.

In determining whether a new trial should be ordered on the ground that the verdict of the jury was against the weight of evidence, the test seems to be whether the verdict is such a one as, in the opinion of the Court, a jury might reasonably find upon the evidence before it.

The fact that the evidence is contradictory, and that there is evidence on both sides, is not a *conclusive* reason why a new trial should not be granted.

Where the evidence is contradictory, but that of the defendant is clearly supported by the documents, whilst that of the plaintiff is not so supported, the Court may, on a motion for a new trial by way of appeal under Order XXXIX., rr. 1, 4, order the verdict in plaintiff’s favour to be set aside and a new trial, but will not order a verdict to be entered for the defendant.

ACTION for malicious prosecution.

New trial motion.

This was an action to recover 5000*l.* damages for malicious prosecution. The action was tried before Madden, C.J., and a jury, and a verdict was given for the plaintiff for 745*l.* The charge upon which the plaintiff had been prosecuted was one of embezzlement as an *employé* of the defendant and in relation to a business which the defendant alleged was managed by the plaintiff for him, but which the plaintiff claimed as his own. The plaintiff was tried at the assizes at Geelong, before A’Beckett, J., and acquitted. The defendant served the plaintiff with a notice of motion, which was in the following form:—

“NOTICE OF APPEAL, dated the 7th day of May 1898.

“Take notice that the Court [Full Court] will be moved on Wednesday, the 18th day of May 1898 at 10.30 o’clock in the forenoon or so soon thereafter as counsel can be heard on behalf of the defendant, for an order that the judgment for the plaintiff as entered herein be set aside, and a verdict and judgment be entered for the defendant, or failing the above that a new trial be had between the parties upon the grounds following:—That the verdict was against the evidence and the weight of evidence; and in the meantime that further proceedings be stayed.”

The motion now came on for hearing.

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Isaac A. Isaacs (A.G.) and *Leon* to move.

F. G. Duffy and *J. E. Hogan* to oppose—There is a preliminary objection. This is not a new trial motion; but it should be. It is an appeal, and is wrong in form. In the first place the notice, which is intended for a notice of motion, is a ten-days' notice instead of an eight-days'—this asks the Court to do what it can and ought to do upon an appeal, viz., to set aside the judgment below and order a new trial. The Court has not power to do this.

[HODGES, J. Is this not an appeal from a determination of the jury to the Court?]

If it was headed "Notice of Appeal" only, and merely asked for what a new trial motion should ask for if made in proper time. The whole procedure shows that this has been treated as an appeal. *Solomon v. Jarvis* (a) lays down the procedure for a new trial, viz., by notice of motion. This is returnable in eight days. The proper alternative course below would have been to ask for a direction that the point should be reserved. Under the old common law procedure there was no such thing as appeal.

Isaac A. Isaacs, A.G.—The proper course under Order XXXIX., rr. 1, 4, is by appeal, and the notice is an eight-days' notice. In *Solomon v. Jarvis* the converse occurred. There was, in that case, a trial by jury, and notice of motion for a new trial. There is sufficient notice here to enable a new trial to be asked for: *Allcock v. Hall* (b).

WILLIAMS, J. The only difficulty is as to the ten days' notice, but we can amend that. I think we may hear this appeal.

The appeal was then argued.

Isaac A. Isaacs (A.G.) and *Leon*—Later decisions show a tendency towards weakening the strict rule against granting new trials on the ground that the verdict is against the weight of

(a) [1886] 12 V.L.R. 76.

(b) [1891] 1 Q.B. 444.

ence: *Aitken v. McMeckan* (c); *Spencer v. Jones* (d). The
 rt may upon this motion enter judgment for the defendant:
Jens v. Shire of Belfast (e); *Forbes v. McDonald* (f); *Allcock*
Hall (g); *Bobbett v. South-Eastern Railway Co.* (h); *Toulmin*
Willar (i); *Ogilvie v. W.A. Corporation* (k).

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WILLIAMS, J., referred to *Owsten v. Mullen* (l).

F. G. Duffy and J. E. Hogan, upon the first question, referred
Metropolitan Co. v. Wright (m); *Phillips v. Martin* (n);
on v. Sheridan (o); *Guest v. Goldsbrough* (p).

Saacs, in reply, referred to *Australian Steam Navigation*
v. Smith & Sons (q).

WILLIAMS, J. My brother Hodges and I think that this case
 ld be tried again. There is no doubt that the evidence is
 rdictory, and that there is evidence both on one side and
 he other as to the main question in this case, but that is not a
 usive reason why the Court of Appeal should not grant a
 trial. In *Allcock v. Hall* (r) the evidence was contradictory.
 re was evidence both ways, but the Court went further in
 case than we are asked to go—viz., they were asked to enter
 rdict for defendant, and they did so. So in *Spencer v.*
s (s). There the evidence was contradictory, and the evi-
 e of the witnesses on one side was against that of the wit-
 es upon the other, yet a new trial was granted. So in *Aitken*
McMeckan (t) the evidence was contradictory, and so in the
 case cited, *Australian Steam Navigation Co. v. Smith*
ns (u). Therefore the fact that there is evidence on both
 is plainly no reason why the Court should not exercise its

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|---------------------------------|--------------------------------------|
| [1895] A.C. 310. | (n) [1890] 15 App. Cas. 193. |
| [1897] 14 <i>Times</i> L.R. 41. | (o) [1896] 12 <i>Times</i> L.R. 285. |
| [1874] 5 A.J.R. 79. | (p) [1886] 12 V.L.R. 804. |
| [1874] 5 A.J.R. 85. | (q) [1889] 14 App. Cas. 318, at p. |
| [1891] 1 Q.B. 444. | 324. |
| [1882] 9 Q.B.D. 424, at p. 430. | (r) [1891] 1 Q.B. 444. |
| [1887] 12 App. Cas. 746. | (s) 14 T.L.R. 41. |
| [1896] A.C. 257, at p. 266. | (t) [1895] A.C. 310. |
| [1867] 4 W.W. & A'B. (L.) 36 | (u) 14 App. Cas. 318. |
| [1886] 11 App. Cas. 152. | |

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power to grant a new trial if it think that a new trial is just. The real test seems to be whether the verdict returned by the jury is such a one as in the opinion of the Court a jury might reasonably find upon the evidence before it. Such a principle renders it necessary to examine into the nature and the class of the evidence which one side or the other relied upon. And if it be found that the evidence upon one side is contrary to the evidence upon the other, and that the written documents put in evidence support the version of one side rather than the version of the other, then the evidence given on one side stands on a superior plane to that given on the other side, and the Court may exercise its jurisdiction by granting a new trial.

We think that the present case falls within the principles to which I have referred; though the evidence is contradictory, though the oral evidence points both ways, yet the evidence for the defendant is supported in a way in which the evidence for the plaintiff is not supported. It is supported by books and other documents, and by facts which are not in dispute between the parties. It has been the practice of this Court, and in England, I believe—certainly in this Court—that the Court while granting a new trial will not say more than it can help. Therefore I do not intend to go into this matter at any length. But, as bearing out what I have said, viz., that the version of the defendant is supported by books and other documents and by admitted facts, it is only necessary to refer to a few matters. These books, according to the plaintiff's version, were kept in the Melbourne office, were his books, his property, and the clerks (according to his version) who made entries in them were his servants, and he used to examine these books, and was responsible for them, and in these books appear entries in which he is shown to have received wages at 3*l.* 10*s.* per week. Then there is the fact (I do not wish to comment much upon it) that, undoubtedly, the defendant had advanced a large sum of money to the plaintiff. The plaintiff says this was a loan; that it was advanced to him by the defendant. There is no doubt about the fact that a sum of money was advanced. The plaintiff says it was a loan; it is a singular thing if it were a loan that there was no interest charged

it by the defendant, and none was paid upon it by the plaintiff to the defendant; and that there was no security taken by the defendant, and no time fixed for the repayment. In the way in which the loan is made, so that the plaintiff cannot operate upon it, is singular. The way this is effected is that the defendant opens an account with the bank in his (the defendant's) own name, and then he directs the plaintiff (exhibit how he is to operate upon that account, tells him how he is to pay by cheques, and that he is to sign "pp. J. Haworth," and then in his own name. He is to borrow in this way on his account, which is opened in Haworth's name. If this had been a loan or advance to the plaintiff there were other ways in which the money could have been advanced or lent to plaintiff (as he says it was lent) without resorting to this extraordinary method of doing it. Then there is the fact, to which I have alluded, that no interest was charged or paid, no security taken. Further, the Melbourne premises, at which plaintiff said he carried on his own business, are insured, and the merchandise in them, which, according to the plaintiff, is his own property, is insured in the name of Haworth, and the premium and the receipt for it with the premium are given to Haworth, and the policy goes into Haworth's possession, and he holds it. Now, any one would think that if this merchandise was the property of the plaintiff that he was most highly interested in securing the property against loss by fire, and would take care that the policy was issued in his own name, and was in his own possession.

Then there is the fact that no charge was made for the work which Haworth did in connection with the Melbourne business; and there is this fact, to which my attention is drawn, that in this deficiency arises, and there is a disturbance about it, that Haworth writes to the plaintiff asking him to give up the business, and it appears that the plaintiff does so almost immediately, not taking up the position of one who says "This is my business; I am going to carry it on."

I do not wish to examine the facts too closely. It is sufficient to mention these facts in order to show the principle on which the Court acts. It is admitted that the evidence is contra-

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dictory, yet that there are a number of admitted facts, and a number of documents, including these books, which give strong support to defendant's case.

I may state that I rather agree with Mr. Duffy's criticism of the letters, and that in all of them I cannot point to any except exhibit C, and a doubtful expression in exhibit 13, which is inconsistent with the plaintiff's case.

On these grounds I think it is better that this case should be re-ventilated.

A'BECKETT, J. I do not think this is a case in which there are any documents which can be said to necessarily constrain the jury to take a view in favour of the defendant, but in a conflict of testimony, and from my own recollection of the case which was before me, I know how many matters there were which the jury might legitimately consider, and on which they were entitled to come to a conclusion. Therefore, though I cannot say that their verdict satisfied me, and I feel there is strength in the different facts which have been adverted to by Williams, J., if I were alone in this case I should require further time for consideration before I would grant a new trial. I do not wish to be taken as dissenting from the view expressed by the other members of the Court. I feel there would be no advantage in hearing further argument, or in postponing the decision by reason of the condition of my mind upon the subject. I do not feel as strongly in the matter as the other members of the Court, and I have a doubt which has not been entirely removed, but I do not dissent from the judgment of the Court.

Motion allowed, with costs.

Solicitors for defendant (appellant): *H. A. Brandt.*

Solicitors for plaintiff (respondent): *Hodgson & Finlayson.*

R. H. C.

COWIE v. THE BERRY CONSOLS EXTENDED GOLD MINING
COMPANY NO LIABILITY (No. 3).

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*Mines Act 1890 (No. 1120), ss. 351, 357 Regulation and inspection of mines—
Ventilation—Level—Working places in a mine—Mine-owner, liability of—
Mine.* September 12, 14.

By sec. 351 of the *Mines Act 1890* the word "mine" includes a level wherein or whereby is or shall be or has been carried on any operation for or in connection with the purpose of obtaining any metal or mineral.

By sec. 357 it is provided—"The following general rules shall so far as may be reasonably practical" ("practicable") "be observed in every mine:—1. An adequate amount of ventilation shall be constantly produced in every mine to such an extent that the shafts winzes sumps levels underground stables and working places of such mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein."

Held, that there is an obligation upon every mine-owner to ventilate the level of an alluvial mine unless such level has been distinctly and clearly abandoned, and that the temporary suspension of work in a portion of a level does not cause such portion to cease to be a working place in a mine.

It is a question for the jury to decide whether the mine-owner has taken all steps reasonably practicable to produce an adequate amount of ventilation.

MOTION for a new trial.

An action was brought by Alexander Cowie, as administrator of the estate of Alexander Cowie the younger, against the Berry Consols Extended Gold Mining Company No Liability. The claim alleged that the plaintiff as administrator brought the action for the benefit of himself and Jane Cowie, the mother of the deceased Alexander Cowie the younger, they having suffered damage from the negligence of the defendant. That the defendant was a no liability mining company, and that Alex. Cowie the younger was employed by the company in the mine as a trucker, and that an accident occurred in the mine on the 31st July 1897, whilst the said Alex. Cowie the younger was so employed, whereby he met his death. The following particulars were delivered:—" (1). An adequate amount of ventilation was not produced in the said mine to the extent of having the underground levels or drives and workings and the travelling places to and from such working places in a fit state for working and passing therein." Other particulars were delivered, but the above are sufficient for the purpose of this report. The action was tried

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before Holroyd, J., and a jury at Ballarat. The following evidence was adduced at the trial, so far as it is material:—

The deceased, Alex. Cowie, was employed as a trucker, and had to push trucks along the main level of the mine, which was an alluvial mine. This level ran east and west of the shaft. On the 29th July it was discovered that foul air existed in the eastern end of the level, and thenceforward work was stopped at two rises called Nos. 2 and 3, towards the extreme eastern end, and the means of ventilation adopted in the mine was shut off from this eastern portion of the mine. The deceased, who went on at the midnight shift on 30th July, was in charge of his usual work, pushing the trucks along the main level, from a rise called No. 1 to the shaft and back again. This rise was between the No. 2 rise and the shaft. The evidence was contradictory as to whether the deceased was cautioned as to the existence of the foul air beyond the rises towards the eastern end, but it was proved that the work was suspended there, and workmen had been withdrawn. The deceased's body was found on the morning of 31st July lying on a truck which he had detached from three others with which he was working, and this truck, being the one of the four nearest to the eastern end of the level, had evidently been pushed by the deceased to the extreme eastern end of the level, where the foul air existed. Evidence was given as to the lighting of the level, and the fact was proved that the lights grow dim as the air becomes foul, and gradually go out as the air becomes worse; but the chief ground debated in argument was as to the obligation to ventilate the whole level, including the portion of the level wherein work had been temporarily suspended. The learned Judge, in charging the jury upon this point, said:—"The plaintiff gives particulars of the negligence which he alleges the defendant was guilty of. Amongst those particulars there are the non-observance of certain rules prescribed by the *Mines Act* 1890. First of all, did they observe these rules or not? (His Honor read the rules in sec. 357.) Those rules shall be observed in every mine, so far as may be reasonably practicable. The charge against the defendant is that the 1st, 10th, 11th, and 16th of those rules were not followed. All these rules must be qualified in this way: they

are to be observed so far as may be reasonably practicable—that is, capable of being put into practice, and of what is reasonable you are the judges. As to the rule dealing with the adequate amount of ventilation I may say this: the main level of the east drive was, in my opinion, a travelling road to working places—it was a travelling road to the north branch, where work was going on, and to the rises Nos. 1, 2, and 3. No doubt the man was found dead at the end of that main east drive, but it was a travelling road to these places and the north and south branches, and it was, in my opinion, a travelling road at that particular moment. It was also, of course, a 'level,' as its name implies, but at the particular time no actual work was going on at the east end of that drive, nor in the numbers 2 and 3 rises in that drive, nor in the south branch, nor was the end of that drive required as a travelling road to those places. But to my mind a main drive like that where a portion of it is not being used on account of a sudden exudation of foul air does not cease to be a travelling road to the working places around it, and to which it ordinarily leads. If the level is abandoned altogether" (The remainder of the learned Judge's summing up material to this point is set out in the judgment of A'Beckett, J.)

The jury found a verdict for the plaintiff, with damages 500*l*.

The defendant now moved for a new trial upon the following grounds, *inter alia*:—"(1.) That the learned Judge at the trial, in directing the jury that although all work had ceased and all men withdrawn in the main east reef drive of the defendant's mine, east of the No. 1 rise, before and at the time of the death of A. Cowie, the younger, that such part of the said mine, east of the No. 1 rise, had not ceased to be a working place in the said mine within the meaning of sec. 357 (1) of the *Mines Act* 1890, misdirected the jury. (2.) That in directing the jury that although all work had ceased and all men withdrawn in that part of the main east drive of the defendant's mine, east of the No. 1 rise, before and at the time of the death of the said A. Cowie, the defendant was, so far as was reasonably practicable, bound to ventilate that part of the mine east of the

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No. 1 rise, the learned Judge misdirected the jury. (3.) That the learned Judge in directing the jury that at the time of the accident to the said A. Cowie the main east drive of the defendant's mine, east of the No. 1 rise, was a travelling road to a working place in the said mine, although all work had ceased and all men withdrawn from such part of such drive and from such working place, and that, notwithstanding such cessation of work and withdrawal of men, the defendant was bound, so far as was reasonably practicable, to ventilate such part of such mine east of the No. 1 rise, misdirected the jury."

The question as to the amount of damages being excessive was also argued.

Purves, Q.C., and *Box* for the defendant in support of the motion—There is no doubt that under sec. 357 (1) of the *Mines Act* 1890 an obligation is cast upon the mine-owner to take such steps as "may be reasonably practical" to provide adequate ventilation.

[HODGES, J. I think the word should be "practicable."]

Yes, that was the word used in the original Act. The ventilation is for the benefit of the men working in the mine, and the sub-section refers to "working places of such mine and the travelling roads to and from such working places," showing that only the portion of the mine where work is being actually carried on is referred to. It is the miners who have need of the ventilation, and miners are only employed at the portions of the mine in actual use. It would be impossible to believe that the Legislature intended that the whole "level" was to be provided with adequate ventilation whether work was going on there or not. The other sub-sections point clearly to the conclusion that the protection aimed at is for those at work in the working places actually in use. The word "mine" in sec. 357 cannot have the wide meaning given to it by sec. 351 ; some limitation must be put upon it. When work has ceased in a portion of the mine, that portion ceases to be a working place. The concluding words of the sub-section, "shall be in a fit state for working and passing therein," indicate that there is to be some limitation. It cannot be contended that a level altogether

abandoned has still to be kept ventilated, and if a portion of it be temporarily abandoned, then from the same point of view the obligation on the mine-owner will cease as to such portion.

[HODGES, J. But no limitation is put upon the word "level" in the sub-section, and accordingly the whole "level" must be in a fit state for working and passing therein.]

Then that would apply to a "level" altogether abandoned, which would lead to the most extraordinary conclusion, and almost put an end to the industry of mining.

[HODGES, J. The first words of the section protect the mine-owners; they have only to take such steps as are "reasonably practicable."]

It cannot mean that you are to ventilate "levels" where no work is being carried on.

F. Gavan Duffy, Bryant, and Schutt for the plaintiff to oppose were not called upon. The case of *Knowles v. Dickenson* (a) was handed to the Court.

WILLIAMS, J. This is a motion for a new trial, the main ground of which is that there has been a misdirection of the jury by the presiding Judge; another ground is that the verdict of the jury is against the evidence and against the weight of evidence. As regards the latter ground it is impossible to say that the verdict is against the evidence; there was abundant evidence to submit to the jury, assuming the direction of the Judge to be right. The question mainly argued is really upon the point of misdirection.

In considering sec. 357 of the *Mines Act* 1890, it is said that the Judge misdirected the jury. If that section bears the construction that counsel for the defendant put upon it, the Judge, no doubt, did misdirect the jury, and the question therefore is, what is the true construction of that section. As I understand it, the Judge left certain questions to the jury, so far as they are affected by this section, in a double way; he said that there was evidence that this was a "level," and I may say that I think the evidence was overwhelming that it was a

(a) [1860] 29 L.J. (M.C.) 135.

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"level," and then he said—"This being a 'level,' the question for you to consider is whether the defendant, as far as was reasonably practicable, caused an adequate amount of ventilation to be constantly produced in the mine to such an extent that that main level was kept in a fit state for working and passing therein." It is perfectly true on the facts proved that at the particular period of time at which this unfortunate man met with his death at the east end of the main level, work was temporarily suspended at the east end; but still, notwithstanding that, it was "a level in the mine," and was used for the purpose "of working and passing therein." The evidence shows that beyond all doubt, and that is what the section refers to. The section in effect says that where a level in a mine is used for working and passing therein, then, so far as is reasonably practicable, the owners of the mine must take care that an adequate amount of ventilation is produced in that level, and upon that view the direction of the Judge was perfectly right. The evidence shows without any doubt that that main level was being used for the purpose of working in it and for the purpose of passing in it, and therefore the duty was thrown upon the defendant to keep up a constant supply of ventilation in that level, so far as was reasonably practicable. That is just what the Judge told the jury. He said that this was a main level, that it might also be considered as a travelling road within the meaning of this first sub-section, and that in that aspect, if considered as a travelling road, it must be a road going to and from the working place in the mine. Then it was said, on behalf of the defendant, that though this might be a "travelling road," it cannot be said to be "a travelling road to and from a working place in the mine," because at the place where the accident happened work had been suspended; that at rises 2 and 3 work had been suspended; and that therefore that road was not used, so to speak, by miners to and from any working place in the mine. For that reason it is said that the direction was wrong. Now, we think the defendant has placed too limited a construction upon those words, "working places." A place in a mine does not cease to be a working place because work is temporarily suspended at a certain spot; because work

is suspended at a certain rise it does not follow that that rise ceases to be a working place. As it was put in the case cited for the plaintiff, it does not cease to be a working place because work is suspended on account of a holiday or on account of a Sunday. The facts, so far as they relate to this part of the "level," are these—that up to almost the very time that the plaintiff's shift went on, that part of the mine—that east end of the main level—was being used for mining purposes and for the purpose of the mine, and then on account of foul air it appears that work was temporarily suspended at that east end. Now, it is said, as a matter of law, that those "rises" 2 and 3 still continued to be "working places" within this sub-section; there was evidence to go to a jury that they still continued to be working places, and it became a question of fact for the jury whether they ever lost their character as working places, and the jury found that they had not, and, therefore, that east end of the main level still continued to be a travelling road. That would cover this particular spot where the man's body was found, and therefore in that aspect the direction was correct. No doubt it does not follow, from what we say, that there is any duty on the part of mine-owners to keep constantly ventilated a level which has been definitely abandoned, or even a part of a level distinctly abandoned. Where it has been clearly abandoned, then, of course, no such duty is cast upon the owner of the mine. Where there has been a distinct abandonment of a whole level, or a distinct abandonment of a portion of a level, then it could not be said that any portion within the abandoned portion is a working place, and there would be no obligation upon the mine-owner, because under the other part of the sub-section it would not be a level used for the purpose of working or passing therein. For these grounds we think that this motion should be dismissed. (His Honor then dealt with the question of the damages, and refused to disturb the verdict.)

A'BECKETT, J. For the purpose of argument, counsel for the defendant had to put a gloss upon the Judge's direction to the jury, to which they object, and they had to read it as if it imposed serious obligations upon mine-owners, which, upon

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examination, will be found to be greatly in excess of those involved in adopting the direction. In reference to the view that the refusal of a new trial will impose unreasonable obligations upon mine-owners, I think it right to bring into prominence this extract from the summing-up, which shows the way the Judge dealt with the subject. He did not pretend to say that under all circumstances a level, because it was a level, must be ventilated. He said—"But to my mind a main drive like that, when a portion of it is not being used on account of a sudden exudation of foul air, does not cease to be a travelling road to the working places around it and to which it ordinarily leads. If the level is abandoned altogether, or a portion of it shut off, or if it was understood, and a public notice of warning has been given that it would be no more used, then I understand it ceases to be a working place, but when only shut up for a temporary reason—viz., foul air—I do not see that that causes it to cease to be a working place or a travelling road; if it were so they need not have any ventilation at all . . . a mere temporary suspension for the purpose of waiting until a change of weather expels the foul air, or until it was expelled by the use of mechanical appliances, would not deprive a travelling road of its character as a working place, and the object of an adequate supply of ventilation means that, so far as they reasonably can, they shall use such means as will enable them to get rid of the noxious gas. They must do this as effectually and speedily as they can; the object is that they shall ventilate that portion of it which is in use in such a manner as to keep foul air down, or get rid of it as far as they reasonably can, and the jury have to decide what is reasonable." That seems to me to be by no means an extreme view of the obligations cast by the statute upon a mine-owner.

HODGES, J., concurred.

Motion dismissed, with costs.

Solicitor for plaintiff: *F. H. Tuthill.*

Solicitors for the defendant: *Mitchell, Nevett & Robinson.*

W. H. M.

[IN CHAMBERS.]

THE UNION BANK OF AUSTRALIA LIMITED v. DEAN (No. 1).

Promissory note—Action—Leave to defend—Setting aside—Instruments Act 1890
(No. 1103), s. 93.

1898
August 31,
September 22.
Hodge, J.

Where a defendant in an action under Part I., Division IV., of the *Instruments Act 1890* has once obtained leave to appear and defend, under sec. 93, by showing facts making it necessary for the plaintiff to prove consideration for the note sued upon, the Court has no jurisdiction to set aside such leave upon a subsequent application by the plaintiff showing facts proving consideration.

SUMMONS IN CHAMBERS.

This was an application on behalf of the plaintiff to set aside an order granting the defendant leave to defend. The action was brought by the Union Bank as indorsee from one Marks Herman and holder of two dishonoured promissory notes against the defendant Dean, who was the maker. The affidavit on which the defendant obtained leave to defend alleged that the plaintiff did not to the best of his belief hold for value either of the notes, but held them merely as agent for collection for the payee and indorsee. It also set forth the reasons for that belief. The defendant also alleged facts showing that no consideration ever passed from Herman to himself for the first note, and that the second note was given by him to Herman as a final settlement of all claims against the defendant, and at its due date was held by Herman. In support of the present application by the bank Herman filed an affidavit on behalf of the plaintiff bank, stating that the notes were lodged by him with the plaintiff bank for collection, and that he had obtained advances on them as security. He also denied that the first promissory note was without consideration, and that the second note included all his claims against Dean. In support of this statement a letter from the defendant to Herman was relied upon. The letter ran thus:—

Melbourne, 27th September 1893.

MR. M. HERMAN.

Dear Sir,—In answer to your letter of this date referring to my promissory note, due to-morrow, for 1,146*l.* 10*s.*, I regret having to inform you that it is quite impossible for me to retire same, or to make reduction in its amount, things being so extremely bad with me at the present time, and I cannot see any chance of them being any better this year.

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I would suggest you granting me a renewal for at least six months, when I hope to be in a position to liquidate any indebtedness to you.

Yours truly,

(L.S.)

JOS. B. DEAN.

This letter was written upon the day before the first promissory note became due. The assistant-manager of the plaintiff bank also stated on affidavit that each of the notes was before its due date given by Marks Herman to the bank for collection, and as part security for advances then and subsequently made to Herman. He also said that the present action was being brought for its own benefit, and in order to reduce the amount secured *inter alia* by the notes. In an answering affidavit the defendant set forth further facts showing that the notes were lodged with the bank for collection merely.

Mitchell for the plaintiff in support of the application—The defendant's allegations are inconsistent with his written admissions. There is an admission that the full sum is owing. The plaintiff is a holder for value, and no allegation is made as to notice or knowledge of any suggested fraud.

Anderson for the defendant to oppose—The plaintiff is merely the agent of Herman to collect, and is not the holder for value. Portion of the sum represented by the note has been paid.

Mitchell in reply—It is not alleged that the plaintiff had notice of this want of consideration.

[HODGES, J. Has not the defendant shown facts which would make it necessary for you to prove consideration?]

No. His allegations are inconsistent with his written admissions.

[HODGES, J. Has he not proved enough in an application for leave to defend? If it is necessary at all for you to prove consideration I cannot set aside the order, but must leave it for you to prove your case at the trial. By sec. 93 of the *Instruments Act* 1890 it is put in a curious way. The defendant is to get leave to defend "upon affidavits satisfactory to the Judge, which

disclose a defence or such facts as would make it incumbent on the holder to prove consideration.”]

But the affidavits dispose of that contention.

[HODGES, J. No; I cannot dispose of it now, because directly they show certain facts it must go to trial. You may have a complete answer, but I cannot under that section dispose of it here. He has to show such facts as make it incumbent upon the holder to prove consideration. If his story is true that the note was indorsed in fraud, it would at once throw the burden upon you to prove consideration.]

That is a view of the section which is new, as the point has not been ever raised before. Does your Honor say that you cannot look into the facts at all when an allegation is made sufficiently strong to shift the burden of proof upon the plaintiff?

[HODGES, J. I do not think I can under the provisions of sec. 93. The defendant by an *ex parte* application gets leave to defend, and unless the plaintiff shows a complete answer that leave will not be set aside. The Judge will not decide upon a conflict of statements made on affidavit. It cannot be set aside simply by proving consideration. You can prove that at the trial.]

Mitchell stated that the construction His Honor put upon the section, never having been raised before, and being contrary to the practice hitherto prevailing, he would ask for an adjournment, to see whether there were any authorities dealing with the point.

Upon a subsequent date, counsel not having applied for leave to further argue the case, the learned Judge delivered judgment.

HODGES, J. In this case a writ was issued under sec. 92 of the *Instruments Act* 1890 to recover money alleged to be due on two promissory notes, due respectively on the 28th September and 21st December 1893. The defendant obtained leave to defend under sec. 93 of the Act, and the plaintiff bank applied to me to set aside that order, so that it might sign final judgment. In the argument it was contended that even though the defendant

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in the affidavit on which he obtained leave to defend showed facts which made it necessary for the plaintiff to prove consideration, yet if the plaintiff came before me and satisfied me that it had given consideration for the note the order for leave to appear and defend ought to be set aside. I was against that view, but reserved judgment, not because I had any doubt on the question, but because counsel for the plaintiff said that he was taken by surprise at the view so expressed, and that if time were given him he would be able to produce authorities in support of his contention. Those authorities have not been sent to me, and counsel has intimated that he had no authorities upon the point. I therefore propose to dispose of the case now.

Sec. 93 of the *Instruments Act* 1890 provides that a Judge shall upon application within a given time upon affidavits satisfactory to the Judge disclosing such facts as would make it incumbent upon the holder to prove consideration give leave to appear and defend; as soon as ever these facts are proved to the satisfaction of a Judge leave to appear and defend is given, and it thereupon launches the action as one to be conducted in the ordinary course according to the ordinary procedure: the burden of proof on the merits is cast upon the plaintiff, and he will have to prove that he gave consideration in the ordinary way, and before the ordinary tribunal, and not on an application to set aside the order giving leave to appear and defend.

If a plaintiff can come before the Court and satisfy it, not that he had given consideration, but that the facts when fully disclosed would show that he need not prove consideration, but that there had been a partial or dishonest statement of the facts by the defendant, and the Court was satisfied that it was so, the Court might have set aside its previous order, but it cannot set aside the order simply on proof that the plaintiff gave consideration.

The summons will be dismissed.

Summons dismissed.

Solicitors for the plaintiff: *Blake & Riggall.*

Solicitor for the defendant: *J. E. Dixon.*

R. H. C.

[IN CHAMBERS.]

THE UNION BANK OF AUSTRALIA LIMITED *v.* DEAN (No. 2).1898
September 29,
October 5.

Practice—"Rules of the Supreme Court 1884"—Order XIV., r. 1—Final judgment—*Instruments Act 1890* (No. 1103), s. 93—Leave to defend under *Instruments Act*.

Hood, J.

Plaintiff issued a writ under the *Instruments Act 1890* as the indorsee and holder of two promissory notes made by the defendant. The defendant obtained leave to defend under that Act upon an affidavit satisfying the Judge that there were facts which would make it incumbent upon the holder to prove consideration. An application to set aside such order giving leave to defend was dismissed upon the same ground, viz., that there were facts alleged by defendant which would make it incumbent upon the holder to prove consideration, the Judge refusing upon such application to decide the question of consideration on the affidavits. The plaintiff then applied under Order XIV., r. 1, for leave to sign final judgment, setting out in the affidavits facts proving consideration.

Held, that notwithstanding the defendant had obtained leave to defend under the *Instruments Act 1890*, such order was no bar under the circumstances of the case to the plaintiff proceeding under Order XIV., r. 1, for leave to sign final judgment.

Sargood *v.* Britten (21 V.L.R. 286) commented on and distinguished.

THIS was an application under Order XIV., r. 1, made on behalf of the plaintiff, the Union Bank of Australia Limited, for leave to sign judgment against the defendant, J. B. Dean. The writ was issued under the *Instruments Act 1890*, and the claim was by the plaintiff as the indorsee and holder of two promissory notes made by the defendant. The defendant had obtained leave to defend under the *Instruments Act* upon an affidavit satisfying the Judge that there were facts which would make it incumbent upon the holder to prove consideration. The plaintiff subsequently moved to set aside the order giving leave to defend, and the application was dismissed by Hodges, J., upon the same ground as mentioned above (see *ante*, p. 327). The plaintiff then took out this summons for leave to sign final judgment under Order XIV., and in an affidavit in support of the application set out facts showing that consideration was given, and certain admissions of liability by the defendant. An objection was taken to the form of the writ, inasmuch as it was not headed "Statement of Claim," but the learned Judge allowed this to be amended.

Mitchell for the plaintiff in support of the summons.

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Anderson for the defendant to oppose—There is an objection to this summons on the ground that the defendant has already obtained leave to defend under the *Instruments Act* 1890, and an application to set aside such leave to defend has been refused, consequently the plaintiff cannot now proceed under Order XIV., r. 1. The point has been expressly decided in the case of *Sargood v. Britten* (a).

Mitchell—Assuming the decision of Hodges, J., to be perfectly correct in dismissing the application to set aside the order giving leave to defend, that will not deprive the plaintiff of the right given under the *Judicature Act* and Rules of proceeding to obtain summary judgment. Hodges, J., founded his judgment upon a new reading of the *Instruments Act*, and did not decide upon the facts of the case at all, and it is still open to the plaintiff to proceed in this way if the facts can be proved to justify judgment being given. The defendant can still set up a plausible defence, and so obtain leave to defend. The case of *Sargood v. Britten* was decided on a different state of facts; the Chief Justice had not to deal with an order made under the *Instruments Act* giving leave to defend on the ground that the onus of proving consideration had been shifted to the holder by the mere allegation of the defendant. The *Instruments Act* does not give any new rights to a defendant; although he has obtained an order getting leave to defend, he is in the same position as any other person if attacked under the provisions of Order XIV., r. 1. Even in cases where a defence has actually been delivered a plaintiff can proceed to get final judgment under Order XIV., r. 1.

Anderson in reply—The present application amounts to an appeal from the order made by Hodges, J. The defendant has obtained a certain right under that order which can only be taken away by setting such order aside. The order not only allows the defendant to appear, but “to appear *and defend*.” The result of judgment being given under Order XIV. would be that

(a) [1895] 21 V.L.R. 286.

the defendant is not to be allowed *to defend* the action, which means that the order already made is to be set aside.

His Honor then heard counsel upon the merits of the case.

Cur. adv. vult.

HOOD, J. The plaintiff company is the indorsee and holder of two promissory notes, of which the defendant is the maker, and the writ herein was issued under the provisions of the *Instruments Act* 1890. The defendant obtained leave to defend upon an affidavit satisfying a Judge that there were facts which would make it incumbent on the holder to prove consideration, and an application to set aside that leave was afterwards refused. The plaintiff now seeks for summary judgment under Order XIV. on an affidavit showing that consideration was given, but the objection has been taken that this procedure cannot be used after leave to defend has been allowed.

In support of this objection, reliance was placed upon the case of *Sargood v. Britten* (b), which is in point. I feel unable to follow that decision. If leave to defend be given because the defendant has satisfied a Judge that he has a defence, I should say that an application under Order XIV. would be dismissed, not for want of jurisdiction, but because the defendant would be entitled *prima facie* to defend. But it is a very different matter to say, as that decision says, that Order XIV. does not apply to cases within the *Instruments Act*. In my opinion, when a defendant obtains leave to defend under that Act, he is then in the same position as any ordinary defendant. The *Instruments Act* does not create any new writ or give any new cause of action. A writ issued under that Act is subject to the provisions and rules of the *Judicature Act*: *Oger v. Bradnum* (c). The *Instruments Act* gives the plaintiff no new right beyond a special mode of procedure, and the principle referred to in *Sargood v. Britten* has, in my opinion, no application where it is only the mode of procedure that is new and not the cause of action. The *Instruments Act* presupposes a plaintiff with a good claim, and then gives him a speedy remedy, or

(b) 21 V.L.R. 286.

(c) [1876] 1 C.P.D. 334.

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rather, in certain cases, it prevents a defence unless by special leave. The defendant is not to appear and defend unless he gets permission, but when he gets that permission he becomes subject to the *Judicature Act* and Rules. Such a defendant is within the words of Order XIV. He has appeared to a writ of summons specially indorsed, assuming that the writ is regular in other respects, and I can see no reason for holding him exempt from the consequences of that order simply because the writ has been issued under the provisions of the *Instruments Act*. It has been decided that a writ under the *Instruments Act* may be a specially indorsed writ under Order III, r. 6, if in the prescribed form: *Ross v. Taylor (d)*; *Gerty v. Morrah (e)*. If such a writ may be specially indorsed for some purpose there is nothing in the inherent nature of the writ to exclude it from the operation of Order XIV. It was urged, however, that as the defendant has obtained leave to appear and defend, a successful application under Order XIV. would deprive him of his leave to defend. This is not correct. Leave to defend means that the defendant is to be at liberty to defend the action notwithstanding that the proceedings have been commenced under the *Instruments Act*, but it does not mean that he is to be free from the ordinary procedure. In the present case the defendant obtained leave to defend on showing facts which called upon the plaintiff to prove consideration. But if the plaintiff can prove consideration, and no answer can be suggested, why should the real object of the rules be defeated by allowing the defendant to go to trial when there can be nothing to try. On the merits I am inclined to think that the plaintiff is entitled to recover the full amount claimed, but there seems to be some confusion in the affidavits, of which I propose to give the defendant the benefit. On his own showing, however, he owes 440*l.*, and I order judgment to be entered for that amount, and the defendant may defend as to the balance. The costs of this application and of the action up to date and of entering up judgment to be plaintiff's costs in the cause. I gather from another report of *Sargood v. Britten (f)*

(d) [1886] 7 A.L.T. 145.

(e) [1889] 15 V.L.R. 510.

(f) 3 A.L.R. 88.

that the defendant there had obtained leave to defend by showing a defence on the merits. If so I would probably agree with the result of the case but not with the reasons given for it.

Solicitors for plaintiff: *Blake & Riggall*.

Solicitor for defendant: *Dixon*.

W. H. M.

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THE QUEEN v. AUSTIN AND OTHERS.

Administration and Probate Act 1890 (No. 1060), s. 115—Probate duty—Transference of property in alleged evasion of duty—Parties chargeable with duty—Liability of executors—Parties.

F.C.
1898
September 8, 9.

An information was laid by the Crown against executors, claiming payment of probate duty on properties alleged to have been transferred by their testator with intent to evade payment of probate duty under Act No. 1060. The executors objected by their defence that no claim existed against them as defendants, and further, that the various transferees of the properties transferred in alleged evasion of the duty were necessary parties.

Held, that the executors were necessary parties to the suit, and that in the circumstances of this case the transferees should also be joined as parties.

Judgment of Madden, C.J. (*ante*, p. 12) disagreed with.

THIS was an appeal from an order of Madden, C.J.

The facts and arguments are fully set forth in the previous report of the case (*ante*, p. 12).

Box (*Topp* with him) for the plaintiff (appellant).

Higgins and *Cussen* (*Hayes* with them) for the defendants (respondents), who were the executors of the testator, James Austin.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT and HODGES, JJ.] This is an appeal from a judgment of His Honor the Chief Justice. This is an action, or rather an information, on behalf of the Crown to recover the sum of 20,000*l.* alleged to be payable as probate duty under the *Administration and Probate Act 1890* in respect of certain lands and estates which it is said were transferred by the testator to certain persons mentioned in the information with the intent to evade the payment of duty.

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This action or information is brought against the executors, who are the only defendants named on the record. When the matter came on for hearing before the Chief Justice the question argued was on paragraph 13 of the defence, which alleged that no claim existed and no remedy was available against the executors of James Austin, and that even if the claim did exist and the remedy were available there was the additional objection taken by the defendants that the various trustees, grantees, or transferees referred to in the information were necessary parties to the action. The learned Chief Justice, as I understand him, held that the objection was right. He upheld the objection stated first in paragraph 13. He says:—"I think I should hold that there is no remedy against these particular defendants for this specific debt. This is a distinct claim, based upon the provisions of sec. 115, and it appears on the true interpretation of that section that the holders of the properties and not the executors should be sued. . . . I hold therefore that the action is not maintainable as against the executors, but only against the particular individuals alleged to hold the properties." We think that that opinion is erroneous, and that in any aspect of the case the executors should and must be joined as defendants. I need say nothing further on that point.

As to the other point, as to whether it is necessary that the other parties referred to in the information should be joined as defendants, we do not think it necessary to say in this present case that it is necessary for those conducting the case on behalf of the Queen to join those parties. We express no opinion as to whether it is necessary that these persons should be made defendants. But the Court thinks that in a case like this, where there are no complicated or intricate issues or circumstances, the only matter being the transfers to these persons—in such a simple case, I say, the Court is of opinion that it would be more convenient to have these persons before the Court, and then the rights of all parties interested could be adjusted, not only as between the Crown and the executors, but as between the transferees and the executors. All that we desire to say is, that in this particular case, and in the conditions under which it comes before us, we think it would be

convenient to have these parties—trustees, transferees, or grantees—on the record. We do not say that it is absolutely necessary—there might be circumstances where it would be inconvenient; but the Court is desirous of adjusting the rights of all parties, and therefore we hold, for that reason, that those trustees and others interested in the lands or estates transferred should be added as defendants.

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Solicitor for the appellant: *Guinness*, Crown Solicitor.

Solicitors for the respondents: *Taylor, Buckland & Gates*.

A. F. M.

IN RE INCOME TAX ACTS.

*Income Tax Act 1895 (No. 1374), s. 27—Jurisdiction of County Court to state case—
Income Tax Act 1896 (No. 1467), s. 16—Stock and share broker—Membership
of Stock Exchange, fee for—Deduction.*

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September 3, 13.
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The County Court has jurisdiction under sec. 27 of the *Income Tax Act 1895* (No. 1374), to state a case for the opinion of the Supreme Court, notwithstanding the repeal of sec. 26 of Act No. 1374 by sec. 16 of the *Income Tax Act 1896* (No. 1467).

A taxpayer being a stock and share broker is entitled to deduct from his gross income the amount paid by him in order that he might become a member of the Stock Exchange, where he carried on his business.

Overruled.
29 V.L.R. 431

SPECIAL CASE stated for the opinion of the Supreme Court by a Judge of the County Court under sec. 27 of the *Income Tax Act 1895*.

The facts are fully set out in the judgment.

Cussen for the Commissioner of Taxes in support of the assessment.

The taxpayer in person to oppose.

Cur. adv. vult.

HOOD, J. This is a special case stated for the opinion of this Court by the County Court under the provisions of the *Income Tax Acts*. The first question submitted is whether there is now any jurisdiction to state a case under these Acts. It is doubtful V.L.R., Vol. XXIV. W

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whether this question ought to be raised in this form, but as it is before the Court I propose to answer it.

The legislation in regard to this matter is in a very confused state. Under the *Income Tax Act* 1895 (No. 1374), all objections to assessments were heard and determined by a police magistrate, whose decision was final unless appealed against as therein provided. The appeal provided was to the County Court, and upon the hearing of any appeal the County Court might state a case for the opinion of the Supreme Court. Then followed a series of provisions with reference to special cases stated for the opinion of the Supreme Court. So far everything was clear. There was first the hearing before the police magistrate, then an appeal to the County Court, and then a case stated for the Supreme Court with directions as to how that Court could deal with the special case. But, apparently, it was found that this course was cumbersome, and it was decided to do away with the proceedings before police magistrates. This alteration, however, was effected in a very summary fashion. The *Income Tax Act* 1896 (No. 1467) directs simply that in secs. 23, 24, and 25 of the previous Act for the words "police magistrate" shall be substituted the words "Judge of the County Court," and the appellate section is repealed. The result is that the objections now go in the first instance to a Judge of the County Court, whose decision is final "unless appealed against as hereinafter provided." The appeal section, however, being abolished, there is now no "appeal as hereinafter provided," so that it is argued that the decision of the County Court Judge is final. Moreover, the power of the County Court to state a case only arises "upon the hearing of any appeal"—sec. 27 (3)—and as there is no appeal it is said that no case can be stated. But on the other hand the Legislature has retained secs. 27 and 28 of No. 1374. The former treats of appeals and of what is to be done upon the hearing of appeals, while the latter prescribes the procedure on a case stated in this Court, and some meaning must be given to these sections if possible. This can only be done by holding that the appeal referred to in sec. 25 is an appeal by way of case stated, and that the appeal mentioned

in sec. 27 is the hearing by the County Court Judge by way of appeal from the Commissioner. The decision of the County Court Judge therefore would be final unless appealed from by case stated, and his decision would be given on the hearing of an appeal to the County Court from the quasi-judicial decision of the Commissioner. This is not a satisfactory way of dealing with the words used, but I think that it carries out the intention of Parliament as expressed. Besides, it gives effect to all the sections, which the contrary contention will not do. I therefore hold that the County Court has jurisdiction to state a case.

The other question submitted is as to the right of the taxpayer to deduct from his gross income the amount paid by him in order that he might become a member of the Stock Exchange where he carries on his business. The answer to this turns largely upon the position of such a member. By the rules of the Stock Exchange membership is a mere personal privilege, lasting for life, subject to suspension or forfeiture, and saleable under certain restrictions. This personal right confers upon the owner the privilege of carrying on the business of stock and share broker in the Stock Exchange amongst the members thereof, which without it he could not do. Is the money spent in procuring this right "an outgoing incurred in production of income," as the taxpayer contends, or is it "a sum used as capital in the trade," which is the Commissioner's view. Several English cases were cited, but I agree with the learned Judge of the County Court in thinking that they do not apply, and I also concur with him in holding that the taxpayer's contention is correct. It is true that this membership is an asset, as the money paid for it may some time or other be recovered. But the money is in no sense invested or used as capital in the business of a stockbroker. It is on the contrary money which the taxpayer has been obliged to pay in order that he may be able to earn his income, and his income is not earned by reason of that money but by his personal exertions. If he paid an annual entrance fee the matter would be clear in his favour, and this seems to me to be the same in effect, the money being paid for the same purpose,

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although it is paid at once and may perhaps be recovered. An illustration was suggested, which seems analogous, of a lease of business premises for the life of the lessee, subject to forfeiture for breach of covenant. In such a case, if the rent were payable yearly, it would be an annual deduction. Suppose the tenant bought the lease. Then he would pay down a sum representing the estimated present value of the rentals. Surely that would be a proper deduction. And yet in both cases the lease would be an asset and would be saleable. The only distinction would be that instead of deducting a proportionate amount each year the lump sum comes off once for all, and this certainly makes no difference in principle. In my opinion the taxpayer is right, and I affirm the determination of the County Court.

Solicitor for Commissioner of Taxes: *Guinness*, Crown Solicitor.

W. H. M.

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August 24, 31.

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[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

[IN CHAMBERS.]

NISBET v. NISBET AND THE ATTORNEY-GENERAL (INTERVENER).

Practice—Attachment of person—Disobedience of order—Divorce—"Decree"—
Alimony—Discretion—Marriage Act 1890 (No. 1166), ss. 84, 85, 86, 87, 88—
Imprisonment of Fraudulent Debtors Act 1890 (No. 1100), s. 3.

Where the Court having jurisdiction over the subject matter makes a wrong order, nevertheless, while such order stands, it is the duty of the Court to enforce it.

Gülchrist v. Gülchrist (17 V.L.R. 724) applied.

The Court has no power under sec. 87 of the *Marriage Act* 1890 when pronouncing a degree *nisi* for dissolution of marriage to order a certain weekly sum of money to be paid by the respondent forthwith for the maintenance of his wife.

Beck v. Beck (17 A.L.T. 202) disapproved.

APPLICATION on summons by Emma Eliza Nisbet for an order that a writ of attachment of the person do issue against her husband, Robert Charles Nisbet, for his contempt, or (in the alternative) for an order for alimony *pendente lite*.

On 1st June 1898 (the respondent not appearing) a decree *nisi* for dissolution of the applicant's marriage was pronounced

by Madden, C.J., and the Court at the same time ordered the respondent to pay to the petitioner for her maintenance the sum of 15s. a week, the first payment to be made on the 6th June 1898. The decree *nisi* was served on the respondent on 14th July 1898, but he refused to make any payment, alleging poverty and inability to pay. On 4th August 1898 Her Majesty's Attorney-General applied to the Court upon the affidavit of the respondent, and obtained leave to intervene, upon the grounds of collusion and suppression of material facts.

The Attorney-General entered an appearance to the suit on 10th August, 1898.

Starke for the petitioner in support—The Attorney-General's intervention is not a reason why the attachment should not issue. It does not amount to a stay of proceedings: *Gladstone v. Gladstone* (a). Even after a decree has been discharged on intervention the costs paid to the solicitor will not be ordered to be refunded. The order to attach is made *ex debito justitiæ*.

(Counsel was stopped.)

A. H. Davis for the respondent to oppose—The application for attachment is bad upon two grounds—(1) it was made without jurisdiction; (2) its effect is suspended by the Attorney-General's intervention. The order purports to be made under sec. 88 of the *Marriage Act* 1890. In this case it was included in the decree *nisi*, and was to proceed before the decree absolute matured. An order for permanent alimony cannot take effect until the marriage is actually dissolved. If such an order be made in the decree *nisi*, it is not to take effect till the decree absolute matures. The point was considered by Hood, J., in *Beck v. Beck* (b), and decided contrary to the English practice. The learned Judge's attention was not directed to the fact that secs. 87 and 88 of the *Marriage Act* 1890 are taken from the *Marriage and Matrimonial Causes Act* 1864, while sec. 84 was taken from the *Divorce Act* 1883. The Divorce Rules 1885 applicable to this question are rules 86–92. Rule 89 was acted upon by A'Beckett, J., in *Wootten v. Wootten* (c). Under

(a) [1875] L.R. 3 P. & D. 280.

(b) [1896] 17 A.L.T. 202.

(c) [1896] 17 A.L.T. 173.

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these rules there is no express direction as to applications for alimony, but in rule 91 are these words :—"Permanent alimony shall unless otherwise ordered commence and be computed from the date of the final decree of the Judge or of the Full Court on appeal as the case may be." The history of legislation in England is shown in *Charles v. Charles* (d). Sec. 88 is taken from 21 & 22 Vict., c. 85, sec. 32. "Decree" means the decree finally dissolving the marriage, not the decree *nisi*. At the time that Act was passed the decree *nisi* was not known. An order for permanent alimony cannot be enforced until the decree absolute: *Waterhouse v. Waterhouse* (e). Under the English practice, and under the apparent intention of the *Marriage Act* 1890 the decree absolute is the time after which permanent alimony is payable. The proper course is to make the order with the decree *nisi* to take effect only when the decree absolute matures. The effect of intervention is to reopen the whole matter.

[HODGES, J. It may be so, but not necessarily.]

Counsel referred to cases cited col. 210, vol. iv., *Fisher's Digest*, 1883.

Starke in reply—On the first point the argument of the respondent might be good on appeal, but this is not an appeal. The respondent has not appealed. An order of the Court cannot be treated as a nullity. The validity of the order cannot be considered on this application: *Per Hodges, J., Abraham v. Della Ca* (f). The order for attachment is a process of execution. A writ of *feri facias* issued upon an order for costs could not be suspended. This is the same process.

[HODGES, J. There is this difference: you must come to court for this writ.]

It could have been obtained as a matter of course before the *Judicature Act*.

[HODGES, J. The *Imprisonment of Fraudulent Debtors Act* practically got rid of it.]

(d) [1864] L.R. 1 P. & D. 260, at p.

264.

(e) [1893] P. 284.

(f) [1898] Unreported.

The legal position is not altered by that Act. Notice must now be given, and the Court has to be satisfied that the legal right exists: *Abud v. Riches* (g); *In re A. & B. (solicitors)* (h); *In re Mecredy* (i). The last case decides also that the Act abolishing imprisonment for debt does not affect the practice. *Evans v. Bear* (k) is strongly in petitioner's favour. The practice, as altered by the *Judicature Act*, is referred to in *In re Evans* (l). It is a process for the recovery of money ordered to be paid. The *Imprisonment of Fraudulent Debtors Act* 1890, sec. 3, merely takes away the writ of *capias ad satisfaciendum*: *In re Sandilands, ex parte Browne* (m). Alimony *pendente lite* may be granted from date of service of the citation: *Brown and Powles on Divorce* (6th ed.), p. 267, citing *Nicholson v. Nicholson* (n). The Court may make such an order even after decree *nisi*: *Foden v. Foden* (o).

Counsel referred to secs. 96 and 117 of the *Marriage Act* 1890.

Davis (by permission)—The order for alimony is in the Court's discretion.

Counsel referred to *Fisher's Digest*, 1883, vol. iv., col. 198; *Holland v. Holland* (p); *Gilchrist v. Gilchrist* (q).

Cur. adv. vult.

HODGES, J. This was an application for liberty to issue a writ of attachment against a husband respondent in a divorce suit for disobedience of an order directing him to pay alimony to the petitioner, which order is contained in the decree *nisi* for divorce pronounced by the learned Chief Justice on 1st June 1898.

It was objected in the first instance that alimony ought not and could not be directed in the decree *nisi*; that such a direction was premature. It was admitted that there was a decision of Hood, J., upon the subject in which it was held that that was

(g) [1876] 2 Ch. D. 528, per Jessel, M.R.

(h) [1877] W.N. 207.

(i) [1894] 20 V.L.R. 431.

(k) [1877] L.R. 10 Ch. 76.

(l) [1893] 1 Ch. 252.

(m) [1878] 4 V.L.R. (L.) 318.

(n) [1862] 31 L.J. P.M.A. 165.

(o) [1894] P. 307.

(p) [1865] 4 Sw. & Tr. 78.

(q) [1891] 17 V.L.R. 724.

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the proper time—viz., *Beck v. Beck* (r). In that case the learned Judge compared secs. 84, 85, 86, 87, and 88 of the *Marriage Act* 1890, and arrived at the conclusion that all the sections, and consequently the particular one in this case, referred to the decree *nisi*. The attention of the learned Judge does not appear in the case to have been called to the fact that these sections were contained in a consolidating Act, that it would not be correct to infer that each word in one section would mean the same as the same word in another section, and that the only way to construe these sections was by reference to the Acts from which they were taken. By the *Acts Interpretation Act* 1890, sec. 32, it is provided that “the Acts enumerated in the Second Schedule to this Act are and are hereby declared to be Acts consolidating public Acts in force in Victoria on the thirty-first day of July one thousand eight hundred and ninety. Such consolidating Acts at and from their commencement respectively shall unless and until other provision be made by and in accordance with law apply severally to the persons things and circumstances appointed or created by and existing or continuing under the several corresponding Acts repealed thereby respectively. All such persons things and circumstances shall continue unless and until other provision be made by and in accordance with law to have under the said consolidating Acts respectively the same status operation and effect they respectively had under the said public Acts in force in Victoria on the 31st day of July one thousand eight hundred and ninety and the several provisions of the said consolidating Acts shall respectively apply and be construed to apply to such persons things and circumstances respectively as if the corresponding provisions of the said public Acts in force on the thirty-first day of July one thousand eight hundred and ninety had not been repealed.” The *Marriage Act* 1890 is one of the Acts referred to in the schedule, and consequently that language applies to it, so that we must construe its language in the same manner as we would the language of the original Acts from which the present sections were taken. We are not now to construe the whole Act as one Act. Looking at the sections from this standpoint, sec.

(r) 17 A.L.T. 202.

85 comes from the *Divorce Act* 1889, and sec. 86 from the *Marriage and Matrimonial Causes Statute* 1864. Now the decree referred to in the latter section was the decree absolute, while that referred to in sec. 85 was the decree *nisi*. Sec. 87 is taken from the *Marriage and Matrimonial Causes Statute* 1864, and corresponds precisely with the English Act 21 & 22 Vict., c. 85, sec. 32. On this section a construction has been placed in the case of *Charles v. Charles (s)* by the learned Judge Ordinary. Construing this section, he says:—"I now pass to the question, which is well worthy of consideration, namely, whether the power given to the Court by the 32nd section ought to be exercised at the time when the decree *nisi* is pronounced, or at the time when that decree is made absolute. The words of the section are—'The Court may if it shall think fit in *any such decree* order,' etc., that is, in the decree referred to in the previous section, namely, a decree 'declaring such marriage to be dissolved.' At the time when the Act was passed there was no such thing as a decree *nisi*, but by the Act 23 & 24 Vict., c. 144, sec. 7, it was enacted that every decree for a divorce should, in the first instance, be a decree *nisi*, not to be made absolute until after the expiration of a certain time. This alteration having been made in the system established by the original Act, the question arose whether the provisions contained in the 32nd section of the original Act were applicable to the decree *nisi* or to the decree absolute. Now, the sense and convenience of the matter certainly point to the decree absolute. Before the Court can order that the husband shall secure to the wife such sum of money 'as having regard to her fortune if any to the ability of the husband and to the conduct of the parties it shall deem reasonable,' it must inquire into the fortune of the wife and the ability of the husband. It must, therefore, take one of two courses. It must either suspend the decree *nisi* after the petition is proved until that inquiry has been gone into, or it may make the decree *nisi* at once, and go into the inquiry before the decree is made absolute. The latter is so obviously the most convenient course that if there is any doubt in the matter the Court ought to adopt it, for it should so read the

(s) L.R. 1 P. & D. 260, at p. 264.

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statute as to render it as useful as possible to the suitors. And no doubt that is the course which has been taken by the Court ever since the statute passed, and it was sanctioned by the Full Court in the recent case of *Sidney v. Sidney* (t). I have no doubt that the practice of the Court carries out the intention of the Legislature, and that 'any such decree' in the 32nd section means the decree finally dissolving the marriage and not the decree *nisi*."

This reasoning was followed in the case of *Waterhouse v. Waterhouse* (u). So that this decision upon sec. 32 of Act 21 & 22 Vict., c. 85, is a decision upon an Act corresponding to sec. 87 of our *Marriage Act* 1890, that the section refers not to a decree *nisi*, but to a decree *absolute*. I am satisfied that if in *Beck v. Beck* the learned Judge's attention had been called to this fact, and it should have been so called, he would have arrived at a different conclusion.

The next question is as to the interpretation of sec. 88. No doubt that section refers to the same decree as is meant by sec. 87. It is supplementary to sec. 87.

The next question is whether this is fatal to the wife's application for attachment. It was argued that, the order for payment having been made without jurisdiction by the Court, and through a mistake, the attachment ought not to go—in fact, could not go. In my opinion that argument is not well founded. The subject matter is one over which the Court has complete control—the suit was properly instituted—the parties in whose favour the order could be made are properly before the Court. Under these circumstances, though a mistake in the exercise of its jurisdiction has been made, still the Court exercised a jurisdiction it possessed, although it was wrong in making the order.

I think that was the view taken by the late Chief Justice in *Gilchrist v. Gilchrist* (v). There a variety of objections were taken to the order. Higinbotham, C.J., said:—"It was further objected that the Court has no jurisdiction under sec. 87 to make an order like the present for the payment of money only, and

(t) [1866] L. R. 1 P. & D. 78.

(u) [1893] P. 284.

(v) 17 V. L. R. 724.

that the order should have been one to secure to the wife a gross or an annual sum of money. The case of *Medway v. Medway* (*w*), which seems to favour this view, was a case decided on appeal. But it was pointed out in *Stephen v. Stephen* (*x*) that the form of the order was condemned in that case; that the jurisdiction of the Court over the subject matter was not disputed, but that the order was held to be wrong because it directed payment, not security, as allowed by sec. 87. In the present case the decree has not been appealed from and the objection cannot prevail on an application for attachment." It was much the same in that case as in this. There it was put that the matter was one of jurisdiction.

In this case, as in that, the Court had jurisdiction over the subject matter, and if the Court went wrong the unsuccessful party could have appealed. But while the order stands it is the duty of the Court to enforce it. It is like a judgment obtained against an individual where the writ was not served. It is quite true that in one sense there is no jurisdiction, but the judgment is good until set aside. The successful party—that is to say, the party in whose favour the judgment has been given—may issue execution, and all proceedings under the judgment are regular until the judgment is set aside. As that is the case here, I see no reason upon the merits of this matter why I should not order the attachment to issue. The decree, as it stands, cannot be set aside by me. One Judge may not set aside the judgment of another Judge or of the Court unless such judgment has been obtained by fraud.

I grant this application, with costs, which by consent I fix at 3*l.* 3*s.* I direct that the writ of attachment lie in the office for four days, in order to give the respondent an opportunity of complying with the order. The costs are to be paid within seven days.

Application granted.

Solicitors for petitioner: *Hickford & Legge.*

Solicitors for respondent: *Westley & Dale.*

R. H. C.

(*w*) 7 P.D. 122.

(*x*) [1891] 17 V.L.R. 447.

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SIMONS v. SIMONS.

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September 12, 26.*Marriage Act 1890 (No. 1166), s. 74 (a)—Desertion—Denial of conjugal intercourse—Divorce—Husband and wife.*

In a suit for divorce by the husband against his wife the following facts were proved :—(a) For three years and upwards matrimonial intercourse had not taken place between the parties, owing to the refusal of the respondent, such refusal being wilful and deliberate and without any cause or excuse ; (b) for three years and upwards the respondent had habitually locked herself from about the hour of 8 p.m. to 8 a.m. in the bedroom which she occupied apart from her husband ; (c) for three years and upwards the parties had not been on friendly terms, nor had they spoken to one another, owing to the conduct of the respondent ; (d) the petitioner had been in no way to blame, and the respondent had acted contrary to his wishes ; (e) during the aforesaid period the parties had occupied the same building.

Held, that these facts constituted evidence of desertion, and that the petitioner was entitled to a decree *nisi* for dissolution of marriage.

REFERENCE to the Full Court.

The petitioner, C. N. Simons, brought a suit for dissolution of marriage against his wife, on the ground that she had without just cause or excuse wilfully deserted the petitioner, and had, without any such cause or excuse, left him continually so deserted during three years and upwards. The parties were married in 1879. There were three children living, the youngest being born in 1888.

The suit came on for hearing before Hood, J., who, after hearing the evidence of the petitioner, ordered that the respondent should be called. The respondent appeared in Court and gave evidence in no way contradicting the testimony of the petitioner. The learned Judge then made the following finding of facts, and referred the matter to the Full Court :—" It is found that—(1) for three years and upwards matrimonial intercourse has not taken place between the parties, owing to the refusal of the respondent, such refusal being wilful and deliberate and without any just cause or excuse ; (2) for three years and upwards the respondent has habitually locked herself from about the hour of 8 p.m. to 8 a.m. in the bedroom which she occupied apart from her husband ; (3) for three years and upwards the parties hereto have not been on friendly terms nor spoken to one another, owing to the conduct of the respondent ; (4) the petitioner has been in no way to blame, and the respondent has

acted contrary to his wishes; (5) during the aforesaid period the parties have occupied the same dwelling. It is referred to the Full Court to decide whether the foregoing facts are sufficient evidence to justify the Court in finding that respondent has wilfully deserted her husband without just cause or excuse for three years and upwards."

Woolf for the petitioner—The facts show a determination on the part of the wife to put an end to the matrimonial relationship. When a woman determines to act no longer as a wife this will constitute desertion. It makes no difference whether the parties live under the same roof or at a distance. She has deserted the petitioner as a wife. In the case of *Nimmo v. Nimmo* (a) it was decided that a wife was entitled to something more than mere support; she was entitled to the society of her husband. See also *Wilkinson v. Wilkinson* (b). In *Yeatman v. Yeatman* (c) it was decided that a husband who withdraws from cohabitation may be guilty of the offence of "desertion," although he continues to support her. Cohabitation means something more than living in the same house—the husband is entitled to the matrimonial society of the wife. It has been decided in America, in the case of *Southwick v. Southwick* (d), that the denial of sexual intercourse is not sufficient ground for divorce. But in *Bishop on Divorce*, vol. i., par. 777, a contrary view is taken. In the present case there is more than the denial of sexual intercourse; there is a complete cessation of all matrimonial duties as a wife, and there is a determination that the relationship should cease.

Counsel referred to the following cases:—*Drake v. Drake* (e); *Sayers v. Sayers* (f); *Fitzgerald v. Fitzgerald* (g).

There was no appearance for the respondent.

Cur. adv. vult.

A'BECKETT, J. This matter is referred to the Court for its opinion as to whether certain facts found by our brother Hood,

(a) [1872] 3 A.J.R. 132.

(b) [1887] 13 V.L.R. 568.

(c) [1868] L.R. 1 P. & D. 489.

(d) [1867] 97 Mass. Rep. 327.

(e) [1896] 22 V.L.R. 391.

(f) [1870] 1 V.R. (I.E. & M.) 33.

(g) [1869] L.R. 1 P. & D., p. 998.

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who heard an undefended divorce suit are sufficient to justify the Court in finding that the respondent has wilfully deserted her husband without just cause or excuse for three years and upwards. The findings are as follows:—(His Honor read the findings). The Judge who referred the case had somewhat similar facts to deal with in the case of *Drake v. Drake* (h), in which the husband was the offender. He there decided, and as I think rightly, that to make up the time during which desertion must have continued to entitle the wife to dissolution of marriage she was entitled to count the time during which her husband came to reside with her as a boarder and remained an inmate of the house she occupied. I need not repeat the reasoning by which he came to the conclusion that, as the parties remained otherwise estranged, taking their meals together and sleeping under the same roof was not a return to matrimonial cohabitation. He observed that such facts would call for great vigilance in dealing with the evidence of abandonment, and doubtless that vigilance has been exercised in arriving at the findings now before us. The differences between the two cases which led to the reference were that in *Drake v. Drake* the husband's aversion from his wife originated in his attachment for another woman, and he had gone to live away from her before he returned to her as a boarder. Here, so far as appears, there was no rival to the husband, and his wife's aversion was not due to her preference for another. There was also no departure of either party from the conjugal residence, in which they had lived in the ordinary relations of husband and wife. They changed from these relations into the extraordinary relations above stated without any break observable by the outside world. The change, nevertheless, involved a complete cessation of what was essential to matrimonial cohabitation. I do not think it necessary to entitle the husband to redress that he should have marked this change by some act which would have attracted the notice of others, such as leaving his house or providing his wife with maintenance elsewhere. By living with her as he did, he may have hoped to soften her obduracy and to make a return to proper married life more easy than if

(h) 22 V.L.R. 391.

the estrangement had been followed by living apart. He made it more difficult for him to prove his case on his resort to the Court, but he should not otherwise suffer for his forbearance. I answer the question reserved by saying that the facts found justify the Court in finding desertion as asked.

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HODGES, J. In this case we are asked to say whether on the findings set out in the judgment of my brother A'Beckett the Court would be justified in determining that the respondent had (within the meaning of sec. 74 of the *Marriage Act 1890*) wilfully deserted her husband without just cause or excuse for three years and upwards.

The findings show clearly that if there was desertion it was wilful, and without just cause or excuse. Therefore the only matter in doubt is as to whether the respondent's conduct amounted to desertion. Now, in my opinion, there cannot be desertion without bodily separation to some extent; no amount of mental estrangement, alienation, or separation will constitute desertion. The minds of husband and wife may be divided *toto coelo*, yet if they cohabit as man and wife it cannot be said that either has deserted the other within the meaning of the statute. The only doubt is as to the extent to which this bodily separation must exist. There is no doubt that where the wife permanently leaves the husband's home and lives in another house her conduct may amount to desertion, and I do not think there would be any doubt that such conduct might amount to desertion where the matrimonial house and the house she went to reside in were adjoining houses in a terrace, and though there was nothing but a wooden partition between her husband's bedroom and her bedroom in such adjoining house; such conduct with other circumstances might show a fixed intention to separate her life from that of her husband—to have nothing more to do with him as her husband, and to live a life entirely apart from him. No authority that I am aware of suggests that the distance from the matrimonial house to the house selected by the wife is a material consideration in determining whether her conduct amounted to desertion. Though, if the circumstances were

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suspicious, such fact might make it necessary to carefully investigate the case. If, then, the wooden partition separating two adjoining houses may produce sufficient separation to justify a Court in determining that the wife has deserted her husband, it cannot, in my opinion, be said that a wooden partition in the same house cannot produce sufficient separation to justify the Court in finding that the wife has deserted the husband, and where, as here, the wife has for three years refused to speak to her husband, has never allowed him to touch her, has locked herself up in a room apart from him, the Court, in my opinion, is justified in determining that the respondent has (within the meaning of sec. 74 of the *Marriage Act 1890*) wilfully deserted her husband without any just cause or excuse for three years and upwards.

HOOD, J. The facts in this case are, in my opinion, sufficient to justify a finding of desertion. If one party to the matrimonial contract deliberately withdraws from the society of the other, contrary to the wish of that other, such withdrawal may amount to desertion if done without excuse and with the intention of abandoning the conjugal relation: *The Queen v. Leresche (i)*. Desertion is pointed at a breaking off, more or less completely, of the intercourse which previously existed: *Williams v. Williams (k)*. The usual evidence by which desertion is established is by showing an absence from the conjugal residence, but cohabitation may be put an end to by other acts besides that of actually quitting the common home: *Fitzgerald v. Fitzgerald (l)*; and there may be desertion though husband and wife had not been living together: *Bradshaw v. Bradshaw (m)*. What is required is an intention to end the relationship of husband and wife, and an act which carries out that intention done without consent or excuse. Thus if a man by his cruelty drive his wife from the house this is desertion by him: *Malone v. Malone (n)*; *Giblett v. Giblett (o)*; *Graves v. Graves (p)*. And if instead of leaving his wife, or forcing her to leave him, a

(i) [1891] 2 Q.B., at p. 420.

(k) [1864] 3 Sw. & Tr. 547.

(l) L.R. 1 P. & D., at p. 698.

(m) [1897] P. 24.

(n) 3 A.L.R. C.N. 87.

(o) [1897] 18 N.S.W. L.R. D. 25.

(p) 3 Sw. & Tr. 350.

man continues to live in the same house with her, but treats her as an utter stranger, he thereby deserts her: *Drake v. Drake* (q). By so acting the husband wilfully destroys the reality of marriage and deprives the wife of that society to which she is entitled, and when it is said that each party to the marriage ought to have the society of the other, this means more than occupying the same dwelling. Merely to neglect opportunities of consorting is not necessarily desertion—*Williams v. Williams* (r)—but to refuse such opportunities with a determination no longer to be bound by the matrimonial tie amounts to a renunciation of the conjugal society and brings the matrimonial life to an end, even though the home be not abandoned. In the present case the conduct of the respondent comes within the above definition, and therefore is evidence of desertion.

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Solicitors for petitioner: *Snowball & Kaufmann.*

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Will—Power of appointment by will—Will not referring to power—Wills Act 1890
(No. 1159), s. 25—*General devise or bequest—Appointment of executors—*
Administration of appointed fund.

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A testator left a sum of 2000*l.* to trustees upon trust to pay the income to an unmarried woman during her life, and from and after her decease upon such trusts and in such manner as she should by will appoint, and in default of appointment, and so far as any such appointment should not extend to her children, and in default of children he directed that such sum or such unappointed part thereof should fall into his residuary estate. The woman subsequently married, and, without having had any children, died, leaving other property and leaving a will in no way referring to the power of appointment. By such will she provided that after paying her just debts she gave and bequeathed certain legacies to her mother, father, brothers, and children of deceased brothers, and appointed an executor; she then gave her jewellery to her mother, except her engagement ring, which she bequeathed, with all else she might leave at the time of her death, to her husband.

Held that by virtue of the *Wills Act 1890* (No. 1159) her will must be regarded as an exercise by her of her power of appointment; that she had so appointed the settled fund, as to show an intention to take it out of the settlement and make it her own; and that the will was to be read as though it were an

(q) 22 V.L.R. 391.

(r) 3 Sw. & Tr. 547.

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appointment of the property to the executor upon trust to pay debts, etc., and therefore the trustees of the settlement had no power to distribute it among the legatees as her appointees, but should hand the fund over to her executor to be administered by him under her will.

ORIGINATING SUMMONS referred into Court.

By the will of James Maclanachan, who died in Tasmania on 22nd January 1884, and probate of whose will was on the 21st February 1884 granted by the Supreme Court of Tasmania to David Taylor, John Taylor, and Charles James Barclay, the executors and trustees thereby appointed, Louisa Maclanachan McEvoy, then Louisa Maclanachan Crooke, became entitled to a sum of about 4000*l.* absolutely, and also to a life interest in the sum of 2000*l.*, which was to be held by the trustees upon trust to pay her the income thereof during her life, without power of anticipation; and from and after her decease, upon such trusts and in such manner as she by her will or any codicil thereto, and whether she should be under coverture or not, should appoint; and in default of such appointment, and so far as any such appointment should not extend, in trust for all the children or the only child of Louisa Maclanachan Crooke, and if more than one equally between them; but if there should not be any child of Louisa Maclanachan Crooke, then he directed that the said sum of 2000*l.*, or such unappointed part thereof, should fall into and form part of his residuary trust fund.

Louisa Maclanachan Crooke was married on the 23rd June 1884 to Frederick Aloysius McEvoy. On the 10th July 1885 she executed a settlement of her share or interest under such will, except about 300*l.*, upon trustees upon trust for herself for life, remainder as she should by deed or will appoint. By deed of settlement dated 20th February 1890 her husband assigned to the trustees of the first mentioned settlement 5000*l.*, to be held upon the same trusts. The National Trustees Executors and Agency Company Limited subsequently became, and was at the date of the death of Mrs. McEvoy, the sole trustee under each of such settlements.

Mrs. McEvoy died on the 26th February 1897, never having had any children, and, save by her will hereinafter referred to, never having exercised or purported to exercise any power of

appointment under any deed or will. By her will, bearing date the 27th of May 1890, she provided as follows:—

“This is the last will and testament of me Louisa Mac-lanachan McEvoy of Melbourne Victoria. After paying my just debts I give and bequeath to my mother the sum of 500*l.* to my father 500*l.* to my brother Warren Robert Croke 1,500*l.* and a similar amount to my brother Charles Garibaldi Croke. I also bequeath the sum of 1000*l.* to be divided equally amongst the children of my brother James and those of my late brother William Tasman Croke. I also bequeath 1000*l.* to my brother James Mac-lanachan Croke. In the event of any of the above pre-deceasing me their shares to be divided between my brothers Warren R. and Charles G. Croke. I appoint W. R. Croke my executor. I leave my jewellery to my mother except my three-stone diamond engagement. This I bequeath with all else I may leave at the time of my death to my dear husband.”

Probate of her will was granted by the Supreme Court of Victoria to Warren Robert Croke on the 8th July 1897. At the time of her death Mrs. McEvoy was entitled to personal property of the value of about 700*l.*, and her debts and liabilities did not exceed 450*l.*

The income of the funds under the two settlements had been paid to Mrs. McEvoy in her lifetime, and the capital fund held by the plaintiff company, as trustee of the two settlements, represented an original capital of 9000*l.*, the present value of which could not now be definitely stated.

An originating summons was taken out by the company against Warren Robert Croke, as executor of Mrs. McEvoy's will, alleging that doubts and difficulties had arisen and existed as to whether, having regard to her will, the property held by the company as trustee was held on trust for the defendant as executor of her will, or whether the beneficiaries or legatees under her will or any of them were appointees under such will, and were as such, and to the extent of their respective legacies or interests, now to be considered as beneficiaries under the settlements or either of them, and generally whether it was the plaintiff company as such trustee or the defendant as such executor who was answerable to such beneficiaries or legatees or

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any of them as regarded the trust property, and whether the plaintiff company could safely and should hand over such property or any of it to the defendant as such executor, and whether as to its dealings with such trust property the plaintiff could accept and would be protected by a release from the defendant as such executor. The summons asked the following questions:—

“1. Whether the property now held by the plaintiff as trustee of each of the said two deeds of settlement, or any and what part of such property, should now be delivered over by the plaintiff to the defendant as such executor as aforesaid, and whether such defendant can now give to the plaintiff as such trustee a valid discharge and release in respect of the same and of the plaintiff's dealings as such trustee ?

“2. Or whether the plaintiff as such trustee as aforesaid now holds any and what portions of such property upon trust to satisfy any and which of the legacies or beneficial interests given by the said will ?

“3. Whether the plaintiff as such trustee as aforesaid has now any and what trusts or duties to perform, or whether it now holds the said property or any and what part thereof as a bare trustee for the defendant as such executor ?”

Weigall for the plaintiff—Both parties are agreed, subject to what your Honor may think, that the will must, by virtue of the *Wills Act* 1890, sec. 25, be regarded as an exercise of the powers of appointment, as in *Re Wilkinson's Settlement Trusts* (a), the only question between us being a mere dry though difficult question of conveyancing as to whether the exercise of the powers operates so as to make her executor the person to receive the moneys from the trustee, he paying the legacies, etc., or whether it does not merely make the legatees under the will the appointees of the funds, and thereby make them beneficiaries of the company as trustees of *Maclanachan's* will and of the settlement. I submit that the latter view is correct. In dealing with the matter it must be remembered that the settled funds are no part of her assets. Under certain cir-

(a) [1869] L.R. 8 Eq. 487.

cumstances which do not exist here, as where her other property would not be sufficient to pay the debts, the settled funds might become equitable assets of her estate. The cases which, I presume, will be relied upon by the defendant are cases where the will has been in terms an appointment to executors or trustees upon certain trusts. Here the appointments are direct to the individual legatees.

Topp for the defendant—We are agreed that the settled funds are subject to the payment of the testatrix's debts, and the legacies given by her, and that after that they go to her husband. The question to be decided, though a difficult question of conveyancing, has, it is submitted, been settled by authority. The cases show that, presuming that under the statute the will is to be regarded as exercising the powers of appointment, it is then a question of the intention of the testatrix—did she intend to take the funds out of Maclanachan's will and her settlement and treat them as her own? : *In re Pinède's Settlement* (b); *2 Vaizey on Settlements*, p. 79; *Brickenden v. Williams* (c); *Re Philbrick's Settlement* (d). If she deals with her entire property as one mass, as in *Re Pinède's Settlement*, that is regarded as showing an intention by the testatrix to take the settled property out of the settlement and treat it as her own: *Willoughby Osborne v. Holyoake* (e). This case is, however, stronger than any of those cited, for here the fund is appointed for payment of debts and legacies, both of which are by law payable by the executor. The testatrix clearly intended that he should pay them.

Weigall in reply—Doubtless the testatrix intended her debts to be paid by her executor, but we say out of her legal assets only, which were amply sufficient to pay them. If the testatrix had provided a different channel for the appointed property and for her own property, the former would not as equitable assets have been liable to debts until the latter was exhausted. Why, then, should it be different merely from the

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(b) [1879] 12 Ch. D. 667.

(c) [1869] L.R. 7 Eq. 310.

(d) [1865] 34 L.J. Ch. 369.

(e) [1882] 22 Ch. D. 238.

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accident that both properties are to go in the same channel? In the various cases referred to the appointment has been to the executors upon certain trusts in express exercise of the power—even in *Re Philbrick's Settlement*, because that was the will of a married woman before the *Married Women's Property Act*, and could only be good as an exercise of the power of appointment. The expression “take it out of the settlement,” in the different cases, does not mean take it away from the trustees of the settlement, but that they are to hold for the different persons named in the will. The case of *Re Curnow* (*f*) shows that where the will deals only with a power of appointment the executors take nothing *jure representationis*. Even if the will gives a power to hand over the property to the executor it does not give the legal estate: 1 *Wms. on Executors* (9th ed.), 574.

MADDEN, C.J. It is said that this is a difficult question, but whether it is that I lack the necessary subtlety or not I cannot see the difficulty of it. The whole matter seems on all the authorities to be this, what was the intention of the person having the power of appointment? How did she propose that this matter should be dealt with, and by whom? If that is the principle, one has to say who is the person who should give a receipt for this money and take it and deal with it. The matter would be quite clear if the appointment by Mrs. McEvoy's will was expressly to the executor of the will upon the trusts of the will. He would then take the money and give a receipt for it. In this particular case it is perfectly plain that so far as this will has reference to the execution of the power of appointment under the statute, her intention was obviously to treat it as her own property. If she had other property, and it is sworn that she had, she intended the whole to be dealt with as if she had it all in her own name; and, out of her whole property, including the settlement property, her debts are to be paid—she expressly directs that; and the balance distributed by paying certain legacies to people indicated by her will, and giving all the rest to her husband. It appears to me that the will is equivalent to this—“I appoint this property to my

(*f*) [1886] 12 V.L.R. 729.

executors that they may pay my debts, etc., and then transfer the balance to the people I name." I cannot see how any other intention can be gathered from the will. It might be that she wished to make this property available for payment of her debts because her other property could not be got in at once. It is plainly her intention that those who are to administer her will are to get hold of all her property, and that is to be taken to include, according to law and according to the agreement of counsel in this case, this settled property. That appears to be borne out by all the authorities cited. In *In re Pinède's Settlement* (g) the question was whether she intended to take property over which she had power of appointment and make it her own property, and the Court there deals with it wholly as a question of intention, having regard to the effect of the section of the *Wills Act* which has been referred to. The Court held that she took it all out of the settlement for the purpose of dealing with all as her own. *In re Philbrick's Settlement* (h) stands clearly as an authority for this proposition, except that an argument has been drawn that, because a married woman could not make a will except in exercise of a power of appointment, she must be taken as expressly making it under the power of appointment. But the case clearly shows that the executors of the will, and not the trustees of the settlement, are to take the property and administer it under the will. I must again say that I cannot realize that this is a difficult matter. I will answer the two propositions involved in the first question, "Yes." It is then unnecessary to answer the second or third questions. I think the plaintiff should pay the defendant's costs, and as trustees they may take those costs and reimburse themselves their own costs out of the settled estate.

Solicitors for plaintiff: *Duffy & King*.

Solicitor for defendant: *O'Halloran*.

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(g) [1879] 12 Ch. D. 667.

(h) [1865] 34 L.J. Ch. 368.

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IN RE THE ESTATE OF PATRICK O'BRIEN, DECEASED.

PRYTZ v. TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED.

Will - Construction—Absolute gift—Clause legally and illegally modifying absolute gift—Perpetuity—Maintenance out of income of void gift of corpus.

A testator's will was divided into paragraphs, and by paragraph 7 he declared that his trustees should hold the property "in trust for such of my children . . . as being male shall attain the age of 25 years (but subject as to the share of Thomas Cuthbert O'Brien to the trusts hereinafter declared concerning the same) or being a female shall attain the age of 25 years, or shall before attaining that age marry . . . but subject to the declaration next hereinafter contained. . . ." By the next paragraph (8) he directed the income of one share to be paid to Thomas Cuthbert O'Brien for his life or until he should alien or encumber it; remainder to his children. By paragraph 9 he declared that the share of every daughter of his in the property should be held by the trustees upon trust during the life of such daughter to pay the interest thereof to her for her separate use, so that she should not have power to deprive herself of the same by sale mortgage charge or otherwise by way of anticipation and after the death of such daughter in trust for her children who being sons should attain the age of 25 years or being daughters should attain that age or should before attaining that age marry and in default of children so attaining 25 or marrying the share of such his daughter should be held upon such trusts and in such manner as his daughter should by deed or will appoint and in default of appointment the share of such daughter should accrue to the testator's other children and the issue of any then dead. By paragraph 12 he declared that his trustees "shall apply the whole or such part as they shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child . . . and shall during such suspense of absolute vesting accumulate the residue (if any) thereof . . . for the benefit of the person or persons who under the trusts herein contained shall become entitled to the principal fund from which the same respectively shall have proceeded with power for the said trustee or trustees to resort to the accumulation of any preceding year or years and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively."

Held that, by the reference to the "trusts hereinafter contained" in reference to Thomas Cuthbert O'Brien's share, the testator must be taken as referring to clause 8 of the will, and by the reference to the "declaration next hereinafter contained" in reference to the daughters' shares he must be regarded as referring to clause 9 of the will.

Held also, following *The Trustees Executors and Agency Company Limited v. Jenner* (22 V.L.R. 584) that the gift to the daughters' children who might attain 25 was void for remoteness, and that the whole of the 9th paragraph was inoperative to restrict the gift made to the daughters, who therefore took absolute interests and not for life only.

But held, that the 12th paragraph, as to maintenance, was separable from the gift to the daughters' children and not subject to the same defect, and that therefore the absolute interests of the daughters were subject to the provision for the

maintenance of their children until each child attained 25 or being female married.

ORIGINATING SUMMONS referred to Court.

Patrick O'Brien died on the 10th April 1887 leaving a will and codicil of which probate was granted by this Court to the defendant, the Trustees Executors and Agency Company Limited, the executors appointed by the will.

The testator left him surviving the following persons beneficially interested under his will and no others—namely, his wife, Mary Agnes O'Brien; his son, Thomas Cuthbert O'Brien; his daughter, Margaret Prytz; Herbert Allister O'Brien, John Patrick O'Brien, and Cornelia Patricia O'Brien, children of Cornelius O'Brien, a son who predeceased the testator; John Edward O'Brien, Eileen Maude O'Brien, and Charles Patrick O'Brien, children of John Edward O'Brien, a son who pre-deceased the testator; Walter John Toohey, Kathleen Mary Toohey, Mary Cecilia Toohey, and Pauline Agatha Toohey, children of Catherine Toohey, a daughter who pre-deceased the testator; Hildegard Sara Prytz (now McLean), Ebba Mary Prytz (now McLean), the defendant Victor Prytz, junior, Ernst Patrick Prytz, Arthur Joseph Prytz, Violet Gerder Prytz and Margaret Helene Prytz, children of the said Margaret Prytz and of the plaintiff Victor Prytz; and Patrick Sydney Spark and Eileen Sara Spark, children of Sara Spark, a daughter who pre-deceased the testator. The testator's daughter Margaret Prytz died on the 3rd July 1890, intestate, and his granddaughter, Margaret Helene Prytz, died on the 12th May 1897, under the age of 21 years and unmarried. All the testator's grandchildren were at the date of his death under the age of 21 years, and nine of them were still under age. The testator's widow and his grandchild, Cornelia Patricia O'Brien, were out of the jurisdiction. The plaintiff Victor Prytz, as the husband of Margaret Prytz, deceased, and as the father of Margaret Helene Prytz, took out an originating summons against the company as executor, and Walter John Toohey, and Victor Prytz the younger to obtain the opinion and direction of the Court upon the matters following:—

“1. As to what is the proper construction of the will of the

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testator as to the gift in clause 7 thereof of the residue of the testator's estate to the children and grandchildren of the testator, and of the declaration in clause 9 of the said will as to the shares of the daughters of the said testator?

2. As to what interest or share in the testator's estate was taken by my wife, the said Margaret Prytz, a daughter of the said testator?"

The originating summons was referred into Court by Holroyd, J., and now came on for hearing.

Topp for the plaintiff now applied for two representative orders—one that the defendant Walter John Toohey should be appointed to represent all those interested upon the intestacy of the deceased, and the other that the defendant Victor Prytz the younger should represent all the children of Margaret Prytz. It has several times been held that the hearing of the originating summons is the proper time to apply for representative orders, that the Judge need not before that time go into the whole facts to see who ought to be represented.

[MADDEN, C.J. I should say that usually the hearing was the proper time. There being no objection raised, I will make the orders asked for.]

Irvine for the defendant company, trustee of the will—The plaintiff is not the administrator of Margaret Prytz, and does not show that he has any right to take out the originating summons. The company raises the objection only for its own protection, for it would like the question determined. It is itself administrator of the estate of Margaret Prytz, and I would suggest that the plaintiff amend by adding the company as such administrator as a defendant.

Topp—The plaintiff claims as the husband of Margaret Prytz, and as such entitled to one-third of her estate. He is a person claiming through a beneficiary, and comes within Order LV., r. 3.

[MADDEN, C.J. I think it would be well to adopt the suggestion of Mr. Irvine.]

Very well. I apply to amend in the way suggested.

[MADDEN, C.J. Let the amendment be made.]

Irvine then appeared for the company as administrator of Margaret Prytz.

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Topp for the plaintiff—It is clear that the testator when using the term in clause 7 of the will, “subject to the declaration next hereinafter declared,” as to his daughters’ shares, referred to clause 9, and not to clause 8, which contains no reference to daughters’ shares. The will is then precisely the same, so far as the daughters are concerned, as in *Trustees Executors and Agency Company Limited v. Jenner* (a), in which A’Beckett, J., held that a clause equivalent to this clause 9 was wholly void; that there was a gift in the first instance to the daughters, and that, though it was lawful to cut that gift down to a life estate, still if a testator does so in a clause which contains a gift over void as being against the law of perpetuities both the lawful and unlawful curtailment will be held to be inoperative. That decision is borne out by the authorities cited—*Ring v. Hardwicke* (b); *Arnold v. Congreve* (c); 1 *Jarm. on Wills* (5th ed.), 264; and *Whittel v. Dudin* (d)—and is, it is submitted, good law.

Cussen and *O’Hara Wood* for the defendant Walter John Toohey—It is submitted, in the first place, that the gift in clause 7 as to the testator’s daughters does not give them an absolute interest, inasmuch as it is expressly made “subject to the declaration next hereinafter contained,” which declaration is admittedly contained in clause 9. By such clause the gift is cut down to a life estate. Such cutting down is perfectly lawful. The clause then goes on to provide what is to happen on the death of a daughter, and her share is given to her children on attaining 25, which is doubtless too remote a gift, and therefore void. But it is submitted that the fact that it is void does not make the original gift to the daughter

(a) [1897] 22 V.L.R. 584.

(b) [1840] 2 Beav. 352.

(c) [1830] 1 Russ. & My. 209.

(d) [1820] 2 Jac. & W. 279.

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an absolute gift, but leaves it lawfully cut down to a life estate by one of the declarations to which the original gift is made subject. Other declarations are contained in clause 9, which, it is submitted, are also perfectly lawful, and apply to the gift to the daughters—namely, the clause carrying it to their separate use and restraining anticipation, and the clause giving them powers of appointment and the gift over in default of appointment. It is submitted that the decision in *Trustees Executors and Agency Company Limited v. Jenner* is not good law, because the restraint on anticipation and power of appointment, though contained in the clause making a too remote gift to grandchildren, were still perfectly good. It was not argued on behalf of those interested in relying on it, and though mentioned in his reply by counsel for the plaintiff company, which was trustee only, A'Beckett, J., did not deal with it. In the earlier argument His Honor himself mentioned the clause restraining anticipation, and was given to understand that the authorities decided that such a clause would also go, and perhaps His Honor was misled by that. The authorities decide that it does not go in such a case as this—that such a clause is absolutely good unless its operation violates the rule against perpetuities: *Herbert v. Webster* (e); *Carver v. Bowles* (f); *In re Ridley* (g); 1 *Jarman on Wills* (5th ed.), 265. If some part of clause 9 be still good, it is submitted that so much of it should be held to be good, including the cutting down of the gift to a life estate, as will carry out the testator's intention without offending against the law. It is also submitted that clause 7 of this will is not the clause which carves out the interests of the various beneficiaries. It merely describes the shares with which the testator subsequently intends to deal. Clearly, this is so as to Thomas Cuthbert O'Brien's share, the words "subject to the trusts hereinafter declared," in clause 7, meaning "you will find how I intend this to go later in the will." If those words in relation to his share have that meaning, it is submitted that the similar words as to the daughters' shares, "subject to the declaration hereinafter contained," have

(e) [1880] 15 Ch. D. 610.

(f) [1831] 2 Russ. & My. 301.

(g) [1879] 11 Ch. D. 645.

a similar meaning. The insertion of the words as to Thomas Cathbert O'Brien's share, in clause 7, distinguish this case from *Jenner's Case*, even if it be good law. There is also this distinction between this case and *Jenner's Case*: there the later clause referred to the share of daughters "bequeathed" by the earlier clause; here the reference in the later clause is to the share, without saying it was bequeathed by the earlier clause. It is also submitted that the maintenance clause of this will shows the testator's intention not to give his daughters an absolute interest. It is further submitted that the gift over is divisible into different parts, some of which at the death of the testator would, in certain events, not offend against the law of perpetuities, and which if those events occurred would be good: *Watson v. Young* (h), extending the doctrine of *Evers v. Challis* (i), but cut down again in *Re Bence* (k). If clause 9 can in any event be good, the Court cannot hold that it would be of no avail in curtailing clause 7.

Guest for the defendant Victor Prytz—I cannot argue that the gift over to Mrs. Prytz's children is not bad, and as to the *corpus*, I adopt the arguments of plaintiff's counsel, and submit that the case so far as *corpus* is concerned is governed by *Jenner's Case*. I, however, submit that the gift for their maintenance in clause 12 is a good gift of the annual income to the children of Mrs. Prytz until they attain 25, or being daughters marry. The gift of the income does not offend against the law of perpetuities.

[MADDEN, C.J. Does it not follow from the gift over to them which does so offend?]

It is submitted that it is separable. It may be argued against me that it is referred to as the share to which a child is entitled in expectancy, but I submit that that is merely descriptive, and is used to point out the fund from which the income is to be obtained. The testator certainly thought he was giving them the *corpus*, but the fact that he has failed to do so legally is no reason for depriving them of the income which he has legally

(h) [1885] 28 Ch. D. 436.

(i) [1859] 7 H.L.C. 531.

(k) [1891] 3 Ch. 242.

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given them. In several cases like this the Courts in England have held that the void gift over is separable from the trust for the maintenance of those who, if the gift was good, would be entitled to the *corpus*, and that the trust for maintenance therefore takes effect: *In re Watson* (l); *Gooding v. Read* (m); *In re Wise* (n). The Court will always endeavour to separate what is good from what is bad in gifts of this nature: *In re Gage* (o).

Irvine—In view of this new argument of Mr. Guest's, the company for which I appear is now representing adverse interests. As trustee of the late Mr. O'Brien's will it has continued to apply the income to his grandchildren's maintenance, and would therefore desire to support Mr. Guest's argument, which would justify them in having so done, but as administrator of Mrs. Prytz it should argue that she took absolutely. If this question had been expressly raised upon the summons, the company would not have appeared as administrator of Mrs. Prytz.

[MADDEN, C.J. I see no objection to amending the summons to raise the question. I apprehend it only means appointing another counsel to represent the company as administrator of Mrs. Prytz. I will adjourn till to-morrow, and that course can be pursued if the parties think fit.]

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Agg now appeared for the company as administrator of Mrs. Prytz, and adopted Mr. Topp's arguments—I ask the Court to allow me, if necessary, to address it on the maintenance question when Mr. Topp has finished his reply.

[MADDEN, C.J. Very well.]

Topp in reply—The restraint on anticipation and power of appointment is inseparably mixed up with the gift over. Both existed in *Jenner's Case*, and both were held to be bad. A'Beckett, J., could not have omitted to notice them, for they were brought under his attention by Mr. Agg immediately

(l) [1892] W.N. 192.

(n) [1896] 1 Ch. 281.

(m) [1853] 4 De G.M. & G. 510.

(o) [1898] 1 Ch. 498.

before he gave his decision. The case of *In re Bence* (p), cited by Mr. Cussen, supports the decision in *Jenner's Case*. If the earlier clause is not the giving clause, neither was it in *Jenner's Case*. Put the provision as to T. C. O'Brien into brackets, then the words of the will as to daughters' shares are precisely the same as in *Jenner's Case*. The reference in clause 7 to the cutting down of T. C. O'Brien's share by clause 8, which in some respects is good, cannot affect the construction of the reference to the cutting down of the daughters' shares, which in all respects is bad. The argument of Mr. Guest as to the maintenance clause stands on the same plane as that of Mr. Cussen as to the restraint on anticipation, only that it is more mixed up with the cutting down of the absolute interest to a life estate, and expressly refers back to the bad gift. It is entirely dependent upon it. In *In re Wise* and the other cases upon which he relies there was no such mixing up. The gift in the first instance was of the income for maintenance. Then there was a gift entirely apart from it of the *corpus*, which was held to be bad. The same provision as to maintenance as the present existed in *Jenner's Case*, and nobody thought of arguing that it was not dependent on the bad gift of the *corpus* to which it referred.

Agg—The maintenance clause is the everyday clause giving maintenance out of an expectant or contingent interest, and is good only so long as there is a chance of the expectancy or contingency happening. If it ceases or if it happens the maintenance clause is at an end. In the cases cited *contra* the maintenance provision was entirely distinct from the gift of the *corpus*.

Cur. adv. vult.

MADDEN, C.J. Originating summons by which it was sought to have an interpretation of a certain clause in the will of the late Mr. Patrick O'Brien. The will is divided into paragraphs. By paragraph 7 the testator declares that the trustee or trustees shall (subject to an annuity to his wife) "hold the said trust premises in trust for such of my children and such children of

(p) [1891] 3 Ch. 242.

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any child of mine having pre-deceased me as being male shall attain the age of 25 years (but subject as to the share of my son Thomas Cuthbert O'Brien to the trusts hereinafter declared concerning the same) or being a female shall attain the age of 25 years or shall before attaining that age marry with the consent of the said trustee or trustees but subject to the declaration next hereinafter contained and if there be more than one such child in equal shares *per stirpes* so that my children taking under this trust shall take in equal shares and the child or children taking under this trust of any child of mine having pre-deceased me shall take and if more than one equally between them the share which his her or their parent would have taken had he or she survived me." Paragraph 8 is the next paragraph after paragraph 7 of course. But it is peculiar that the testator in paragraph 7 subjects his general disposition of the share in the case of Thomas Cuthbert O'Brien to the "trusts hereinafter declared concerning the same," and as to the shares of any female "subject to the declaration next hereinafter contained." So that if one were to read the will in the ordinary way the paragraph relating to females should be number 8, and not as it is, number 9; but I think it was intended that the words "hereinafter contained" in relation to Thomas Cuthbert O'Brien meant "next hereinafter" or paragraph 8, and that "next hereinafter contained" in relation to the females meant the next after that. That was what was running in the mind of the person who drew the will. It is perfectly certain that that was the intention, because paragraph 8 relates solely to Thomas Cuthbert O'Brien's share, and paragraph 9 to the shares of females. By paragraph 9 he declared "that the share of every daughter of mine in the said trust premises shall be held by the said trustee or trustees upon trust during the life of such daughter to pay the interest of her said share into her proper hands for her separate use independent of any husband and so that such daughter shall not have power to deprive herself of the same or any part thereof by any sale mortgage charge or otherwise by way of anticipation. And after the death of any such daughter in trust for the child and if more than one the children of such daughter who being a son or sons shall attain the age of twenty-five years

or being a daughter or daughters shall attain that age or shall before attaining that age marry with the consent of the said trustee or trustees and if more than one in equal shares and if there be no child of such my daughter who being a son shall attain the age of twenty-five years or a daughter who shall attain that age or marry before attaining that age with such consent as aforesaid then after the death of any such my daughter and such failure of issue as aforesaid the share of such my daughter shall be held upon such trusts and in such manner as such my daughter whether married or sole shall by deed with or without power of revocation and new appointment or by will or codicil appoint. And in default of such appointment and so far as any such appointment shall not extend as well the original share of such my daughter as any other share which may accrue to her under the present provision and the interest and income thereof shall accrue to any other my child or children and the issue of any my child or children who may then be dead in equal shares *per stirpes*." Paragraph 9 is clearly bad for remoteness. It is obviously so, and it is admitted by all the parties that it is so, and the question is what is the effect of the invalidity of that particular bequest on the share of the daughter, Margaret Prytz, who married the plaintiff? It was contended before me, on the authority of the case of *Jenner v. The Trustees Executors and Agency Company (q)*, that the first bequest in paragraph 7 is an absolute gift to the female children of the testator, and that the whole of clause 9 is bad because the part of it which is too remote is bad—that clause 9 is, in truth, one whole scheme by which the testator desired to effect a certain preservation of the shares of the daughters themselves, and then a disposition in favour of the daughters' children, and that as the disposition in favour of the daughters' children failed the whole scheme broke down, and that it was to be treated as the testator's intention that as the part intended for the benefit of the daughters' children broke down, for which alone he was endeavouring to cut down his daughters' interests, he must be taken to have intended that the original gift should remain unaffected by such attempted

(q) 22 V.L.R. 584.

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cutting down. The decision of Mr. Justice A'Beckett in *Jenner's Case* was that that was the effect of the will, which was almost *totidem verbis* with this will, as far as paragraphs 7 and 9 are concerned. But it was argued before me that paragraph 8 of this will made a special provision in favour of Thomas Cuthbert O'Brien and his children, which showed that paragraph 7 was not to be taken as giving the share, but merely as a statement or description of the sums to be taken as to quantities, and not as to the terms of the bequest, and therefore that this case differed from *Jenner's Case* by reason of the light to be thrown on it by paragraph 8—that in relation to this will there were not absolute gifts to the daughters. I have carefully examined them, and I think it is quite impossible to distinguish this case from *Jenner's Case*. Some very ingenious arguments were put by Mr. Cussen to endeavour to establish a distinction, but I think there is no substantial distinction. As the decision in that case commends itself to my mind, I have no difficulty in deciding that the gift to Margaret Prytz was absolute under paragraph 7. There was an intention, if the whole scheme in paragraph 9 could be carried into effect, to limit that gift in the way there indicated; but as it broke down for the defect I have already referred to, I think the gift in paragraph 7 was absolute in favour of Margaret Prytz.

Then it was contended that the absoluteness of that gift was limited, so far as Margaret Prytz's children were concerned, by paragraph 12 of the will. That paragraph declares "that the said trustee or trustees shall apply the whole or such part as they shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child either directly or shall pay the same to his or her guardian or guardians without being responsible for the application thereof or requiring any account for the same and shall during such suspense of absolute vesting accumulate the residue (if any) thereof in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks funds or securities as are hereinbefore mentioned for the

benefit of the person or persons who under the trusts herein contained shall become entitled to the principal fund from which the same respectively shall have proceeded with power for the said trustee or trustees to resort to the accumulation of any preceding year or years and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively."

It was argued by Mr. Guest, on behalf of the children of Margaret Prytz, that this clause, though having reference to the disposition in favour of those children, which I have held to be bad, was itself good, because it was separable from it, and is a gift of a different nature, and is free from the defect of remoteness. I think that this is a correct argument. Several authorities in favour of it were cited, three of them very modern, and one of them a decision of the Court of Appeal in England, in which two Judges exceedingly learned on questions of this kind are quite clear that, in a case by no means unlike this, the clause for maintenance might subsist, although the share itself is bad. I think that is plain enough in this case. It is perfectly clear that the testator did not intend to create a bad share and then to declare maintenance in connection with that bad share. He thought the disposition in remainder made by him would have effect, and his intention was that while he postponed the handing over of their shares until they attained twenty-five years, after the death of their mother, nevertheless they were to be provided at once with maintenance till they reached the postponed age. When they came to the too remote age, then they were to have the *corpus*. I think, therefore, that the reference to the bad shares does not in any way affect the shares themselves under the maintenance clause, but is merely a method of reference to a class of children who are to be maintained and also to show the *corpus* whence the maintenance is to come. The first decision in *Gooding v. Read* (r) is, I think, a perfect authority in favour of this proposition. Then there is a case of *Re Watson* (s), in which precisely the same kind of thing arose, and *Gooding v. Read* was followed. The latest case of all was

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(s) [1892] W.N., p. 192.

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Re Wise (t). In that case Mr. Topp sought to distinguish what was done there by this fact, that the first disposition declared in the will of the testator was the disposition of the personal estate in trust for investment, and then to apply the income to maintenance, and then followed a disposition, void for remoteness, of the *corpus*. In other words, the maintenance preceded the disposition of the *corpus*. In this case it followed it. But it is clear to me that there is no difference in principle. The *corpus* which was to produce the income was in that case the *corpus* the gift of which was bad for remoteness. It followed *Re Watson*, and went further as to the continuation of the maintenance, and I think that that is the case that I ought to follow in this respect. I do not know whether there are any children who have attained twenty-five.

[*Guest*—Two daughters are married and their right would cease under the clause.]

The trustees are now at liberty, as in the case of *In re Wise*, in their discretion to apply the whole or any part of the income of these shares to the maintenance of all the children who, if the gift of the *corpus* was good, would be entitled to their share thereof up to the date they would have been so entitled, and as to the other children up to their attaining twenty-five years of age or marrying. Consequently I will answer the questions thus:—

(1.) I declare that the whole of the declaration in clause 9 fails by reason of the defect of remoteness, and that the result is the gift in 7 is absolute in favour of female children of the testator, subject however to answer 3.

(2.) An absolute gift subject to the provision for maintenance referred to in answer 3.

(3.) Clause 12 entitles the children of Margaret Prytz to maintenance at the discretion of the trustees after the manner indicated in the case of *In re Wise*, as I have just stated. Costs of all parties out of the estate, the costs of the trustees as between solicitor and client.

(*Topp* as to the 3rd answer.)

MADDEN, C.J. The trustees should in their absolute discretion apply the whole or any portion of the income from the expectant shares of the children of Margaret Prytz to their maintenance; as to those in respect of whom the conditions are fulfilled; which would have entitled them to the shares of the *corpus* bequeathed if the gift was good, up to the date the conditions were fulfilled, as to children as to whom they have not been fulfilled, up to the date when those conditions are fulfilled. I desire in my judgment to follow *In re Wise* as to the form of the order. Liberty to apply.

Solicitor for plaintiff, as executor of Patrick O'Brien: A. C. *Destrée*.

Solicitors for defendant company, and as administrators of Margaret Prytz's estate: *Madden & Butler*.

Solicitors for defendant Toohey: *Hill & Talbot*.

Solicitors for Victor Prytz the younger: *Williams & Matthews*.

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Instruments Act 1890 (No. 1103), Part I., Division 4, sec. 93—Practice—Action upon bill of exchange—Summary proceedings—Leave to defend—" Rules of Supreme Court 1884"—Order XIV., r. 1.

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Where a defendant has obtained leave to appear to a writ issued under the provisions of Part I., Division 4, of the *Instruments Act 1890*, and to defend the action, and has entered an appearance, he is entitled to go to trial in the ordinary way, and the procedure under Order XIV. is inapplicable.

The words "to defend the action" in sec. 93 of the *Instruments Act 1890* mean to defend the action to the end, according to the ordinary course of proceedings in the Court.

Order of Hood, J., varied.

Sargood v. Britten (21 V.L.R. 286) discussed.

APPEAL from an order of Hood, J., reported *ante*, p. 331. The facts are sufficiently stated in the judgment.

J. C. Anderson for the defendant appellant—The procedure under Order XIV. does not apply. The leave to defend granted by Hodges, J., entitled the defendant to go to trial in the ordinary course.

[HOLROYD, J. A defendant has the right to appear and defend the action upon paying the money into Court. That

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leave is given absolutely by sec. 93 of the *Instruments Act*. If the judgment of my brother Hood were correct, a Judge in Chambers could deprive defendant of that right.

WILLIAMS, J., referred to sec. 98.]

Everything provided in sec. 93 of the *Instruments Act* is also provided in Order XIV., except the clause in the section "as make it incumbent upon the holder to prove consideration." Order XIV., r. 3, deals with payment into Court. The history of the special procedure shows that the provisions of the *Instruments Act* as to bills was extended later to liquidated demands by the framers of the Rules: Order III., r. 6. The two latter jurisdictions do not overlap each other. The plaintiff made his choice. The leave given to defend is absolute up to trial.

(Counsel was stopped by the Court.)

Mitchell for the plaintiff bank, respondent—The granting of leave to defend merely puts a defendant in the position of an ordinary litigant subject to the ordinary procedure.

[HOLROYD, J. But look at Order XIV. That shows that the order empowering a plaintiff to enter judgment deprives the defendant of the right to defend, which is taken away from him unless he shows a plausible defence or such facts as entitle him to defend.]

If the summons is dismissed he has the right to defend. If there is this merit in the word "defend," the form in Appendix K, No. 7, shows what is meant. The English decisions show that after a decision dismissing an application under Order XIV., a summons can be brought again.

[HOLROYD, J. The form in Appendix K is unnecessary. Practically the leave to defend is contained in the refusal to allow final judgment to be signed.]

The rule says "such facts as may be deemed sufficient to entitle him to defend." In *Dombey and Son Limited v. Playfair Brothers (a)*, unconditional leave to defend was given, yet a second application for final judgment was granted.

[HOLROYD, J. Upon what ground?]

(a) [1897] 1 Q.B. 368.

Upon the technical ground that the technical defect in the writ was cured. In this case Hodges, J., decided upon a technical ground that the plaintiff could not go into the merits.

[HOLROYD, J. That ground is not a technical one, like the placing of a wrong name on the writ in which to sue or to defend.]

The facts were not considered by Hodges, J.

[HOLROYD, J. In *Dombey and Son Limited v. Playfair Brothers* there was in the first application no adjudication. Hodges, J., had something to decide.

WILLIAMS, J. If in the case cited the Judge was satisfied that facts entitling the defendant to defend were disclosed, and had dismissed the summons, could the plaintiff have made a fresh application?]

The Court would have jurisdiction, but would be met with the answer that the point was already decided. The decision in *Sargood v. Britten* (b) is clearly wrong. It means that a plaintiff cannot sue upon a bill at all.

[HOLROYD, J. When a defendant pays the sum indorsed on the writ into Court could the plaintiff then proceed under Order XIV. ?]

If the defendant has paid the money into Court no Judge would give the plaintiff summary judgment, but would have jurisdiction subject to Order XIV., r. 3. In a case before A'Beckett, J. (unreported) leave to defend was set aside. The procedure under Order XIV. is not consistent with that under the *Instruments Act*. Leave to defend is merely given by showing grounds making it incumbent on the other side to prove consideration.

[HOLROYD, J. Leave to defend means leave to defend before a jury. The Act refers to proceeding in the ordinary way, and a defendant should not be shut out by Order XIV., which allows the Judge to determine on affidavit whether consideration has been proved. It is one thing to prove consideration by affidavit and another thing to prove it by oral testimony in open Court. They are two different modes.]

(b) [1895] 21 V.L.R. 286.

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The defendant obtains leave to defend upon grounds which give the plaintiff no notice.

[HOLROYD, J. The words "defend the action" in sec. 93 were introduced into it when there was neither *Judicature Act* nor rules under it. There was nothing then suggesting trial by affidavit. "Defend" did not then mean "defend by affidavit." The findings of the two Judges are inconsistent. One gives leave to defend the action, the other finds that defendant should pay 440*l*. I think if this matter were carried out it would mean that an appeal would lie from one Judge to another.

A'BECKETT, J. Suppose the words "make it incumbent on the holder to prove consideration" were in Order XIV., then there would be two sections, one from the Act and one from the rule, imposing exactly the same duty on the Judge. He would have to say in one case that he gave leave, and in the other that he certified. It was not intended that the same thing should be done or attempted to be done twice. Your argument seems to hang upon these words—"incumbent upon the holder to prove consideration." It could not have been meant that two Judges should consider exactly the same thing.]

The defendant may not appear until he obtains leave.

[A'BECKETT, J. The question under both procedures is whether the defendant should have leave to defend. In each case what the Judge has to consider is stated in terms almost identical. It would seem in the absence of those words to be most unreasonable that you should apply under Order XIV.]

There is no doubt that the bank gave and showed consideration.

[HOLROYD, J. Can the words "to defend the action" mean to have or include having the action tried by affidavit? Under Order XIV. the plaintiff is trying to preclude the defendant from defending the action. The English decision does not touch the point. *Dombey & Son v. Playfair* does not alter the meaning of the words "leave to defend the action."]

The defendant may not plead within the proper time.

[WILLIAMS, J. If he does not he breaks the rule as to defending.]

WILLIAMS, J. This is an appeal from an order made by Hood, J. The plaintiff was indorsee and holder of certain promissory notes made by the defendant and given by him to one Marks Herman, by whom they were indorsed to the plaintiff.

A writ to recover payment of the amount of these promissory notes was issued under the provisions of Part II. of the *Instruments Act* 1890. The writ having been issued under that Act, the defendant under sec. 93 of the Act had to apply to a Judge of the Supreme Court for leave to appear to the writ and to defend the action. That section provides what a defendant has to do in order to get leave, not only to appear, but also to defend the action. He may get such leave by paying into Court the sum endorsed on the writ, or "upon affidavits satisfactory to the Judge which disclose a defence or such facts as would make it incumbent on the holder to prove consideration or such other facts as the Judge may deem sufficient to support the application." The defendant in this case showed *ex parte* that he gave consideration. He applied to Hodges, J., for leave to appear to the writ and to defend the action. The learned Judge perused the affidavits. He was satisfied with the facts set forth in them, and he thereupon gave defendant unconditional leave to appear and to defend—that is to say, to appear to the writ and to defend the action. The plaintiff on being advised of that order applied to the same Judge—viz., Hodges, J. (reported *ante*, p. 327)—to set aside or vary that order upon affidavits which it brought forward, these affidavits being framed, as I understand, to show that the bank gave consideration for these notes. The learned Judge held that upon the construction of sec. 93 he ought not upon facts of that description to set aside or vary the absolute leave given to the defendant to appear and defend, so therefore he would not consider the facts that the plaintiff brought forward in order to show consideration. He held that he could not consider these facts for the purpose of varying or setting aside the leave already given.

Then, the learned Judge having refused to disturb his

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previous order, and the defendant having appeared to the writ, the plaintiff took out a summons under Order XIV., r. 1, for final judgment for the amount claimed by the writ. This summons came on for hearing before Hood, J., who made an order that the defendant should not be at liberty to defend the action *quod* the sum of 440*l.*, that final judgment should be signed against him for that amount, and that he should be allowed to appear and to defend only in respect of the balance. From that order this appeal is now brought and the question for our consideration is whether in cases where the defendant has obtained unconditional leave to appear to a writ and to defend the action under sec. 93 of the *Instruments Act* 1890, rule 1 of Order XIV. applies.

We do not think it does. I quite agree with the observations made by my brother Holroyd during argument that the word "defend" in sec. 93 of the *Instruments Act* 1890 has a wide and large meaning. The words "leave to appear and to defend the action" mean not only that a defendant is to be at liberty to enter an appearance but also to do much more. The statute empowers a Judge to give a defendant that leave to appear, and when this is done he is at liberty to defend the action to the end, as long as he complies with the provisions or rules regulating the practice and procedure of the Court. In other words, he has liberty to defend the action to the end, according to the ordinary course of proceedings in the Court. The Act empowers the Judge to give that leave. He has in this case given that leave. The effect of allowing Order XIV. to apply would be to give another Judge in Chambers power to reverse the order of the Judge who has already given leave under sec. 93 of the *Instruments Act*. He can then say to a defendant, "Although another Judge has given you leave to defend the action to the end you shall not do so." Upon that ground we think rule 1 of Order XIV. does not apply to a case where a defendant has obtained leave to appear and defend under the section. Reliance has been placed upon sec. 98 of the *Instruments Act* 1890, but the answer to that is that in our opinion rule 1 of Order XIV. is inconsistent with the provision in the *Instruments Act* giving the defendant leave to appear and defend.

It appears the Chief Justice has decided the point raised in this case in *Sargood v. Britten* (c). Speaking for myself (I think my learned brothers agree with me) I think that decision is right. But we do not agree with the grounds of it. The conclusion seems to be right, but we cannot say we entirely agree with the reasons His Honor has stated for arriving at his decision.

For these reasons we think that the decision of Hood, J., is wrong. The appeal will therefore be allowed with costs. The summons for final judgment before Hood, J., will be dismissed with costs.

HOLROYD, J. I wish to add one word upon the meaning of the phrase "to defend the action." I have already, during argument, indicated my opinion as to the signification of that phrase. When the sections, which have since been incorporated into the *Instruments Act* 1890, providing that in cases of bills of exchange a defendant should be obliged to apply for leave to defend—when these clauses first became law no such thing was known to the common law as evidence in an action on affidavit, or an action concluded or determined by affidavit. The words "defend the action" must, if the course of practice be followed and examined, mean "get the case tried by a jury upon oral evidence and have the benefit of the verdict of a jury." Order XIV., r. 1, when using the same words "defend the action" evidently uses them in the same sense. The object of Order XIV. was to enable a plaintiff to obtain in certain cases final judgment upon an affidavit stating the facts prescribed, and to prevent the defendant from defending altogether. That this is the object of the order is plainly shown by the rule itself. Neither the words now introduced into the *Instruments Act* 1890 or into Order XIV., r. 1., oblige a defendant to have his case tried by affidavit. On the contrary, the Order XIV. scheme was contrived to prevent a defendant, where there is practically no real defence, putting the plaintiff to the trouble and expense of the ordinary procedure to prove his case.

When once these words are explained the matter becomes

(c) 21 V.L.R. 286.

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perfectly clear. Where one Judge says "You shall have leave," another Judge cannot say "You shall not."

I agree with all my brother Williams has said. I think my brother Hood is wrong.

A'BECKETT, J. I concur.

Appeal allowed.

Solicitors for plaintiff bank: *Blake & Riggall.*

Solicitor for defendant: *J. E. Dixon.*

R. H. C.

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September 28,
November 11.

Hood, J.

OAKLEIGH, MAYOR, ETC., OF v. GRAY.

Local Government Act 1890 (No. 1112), ss. 179, 272, 277, 288—Rates, recovery of—Resolution for striking rate—Signing rate book—Appeal against rate—Invalidity of rate, right to take objection as to—Local Government Act 1891 (No. 1243) s. 76—Special rate.

A resolution confirming a special rate was passed in 1893; the rate book was not signed until 1898 by three councillors according to the provisions of sec. 277 of the *Local Government Act 1890*.

Held, that the signing by such councillors after the lapse of such a period did not invalidate the rate and did not make the rate retrospective.

Semble, a rate is made when the resolution therefor is passed.

By sec. 288 of the *Local Government Act 1890* it is provided that "upon any complaint or suit for the recovery of any rate from any person the invalidity or badness of the rate as a whole or in respect to any part thereof shall not avail to prevent such recovery."

Held, that this provision covers any objection to the validity of the rate, no matter how or when such alleged invalidity appears.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of the Court of Petty Sessions at Oakleigh dismissing a complaint of the mayor, councillors, and burgesses of the Borough of Oakleigh. By the complaint the defendant, A. H. Gray, was sued for the sum of 16*l.* 15*s.* 5*d.* for money payable for rates due. The particulars were as follow:—

1897	To a special improvement rate for the year 1897 due by you	<i>l.</i>	<i>s.</i>	<i>d.</i>
Oct. 2.	on date in margin on your property having a frontage of 92 feet to Station-street, Oakleigh	...	...	...
			3	7
1896	To like rate for year 1896 due by you on date in margin on			
Oct. 2.	same property	...	...	...
			3	7

1895	To like rate for year 1895 due by you on date in margin on	<i>l. s. d.</i>	1898
Oct. 2.	same property	3 7 1	OAKLEIGH,
1894	To like rate for year 1894 due by you on date in margin on		MAYOR, ETC., OF
Oct. 2.	same property	3 7 1	<i>v.</i>
1893	To like rate for year 1893 due by you on date in margin on		GRAY.
Oct. 2.	same property	3 7 1	<u>Hood, J.</u>

It appeared that in proving the case for the complainant the solicitor tendered in evidence the special improvement rate book sealed with the complainant's seal and signed by three councillors. Objection was taken by the solicitor for the defendant to the admission of the book. The book was admitted subject to objection. It appeared from this book that it was signed by three councillors on the 5th July 1898. (This was prior to the service of complaint or of the demand for payment.) The first payment to be made under the rate was on 2nd October 1893. The meeting striking the rate was on the 10th May 1893, and the meeting at which the same was to be confirmed was called for 7th June 1893. On that date there being no quorum, the meeting was adjourned to the 9th June.

The Court dismissed the complaint, on the ground that the rate was not legally made, the meeting of 7th June being held after an interval of 27 days only instead of 28 days from the striking of the rate, and that therefore sec. 179 of the *Local Government Act* 1890 had not been complied with.

The rate book produced had the following entry :—

"Special Improvement Rate made on the Tenth day of May 1893, and confirmed on the Ninth day of June 1893, in accordance with the *Local Government Act* 1891. Rate payable on 2nd day of October in each year until the amount set opposite each name shall have been paid.

"Notice *re* making of Special Improvement Rate, page 265, Minute Book No. 1.

"For Special Improvement Rate, see page 275 of Minute Book No. 1."

Then followed details of occupiers, owners, description of property rated, total amount chargeable, annual rate.

The seal of the Borough of Oakleigh was attached, and then followed the signatures of three councillors, such signatures being dated fifth July 1898.

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The complainants obtained an order *nisi* to review the decision on the following grounds:—(1) That the special order striking the rate was legally made. (2) That under the *Local Government Act* 1890, sec. 288, and Act No. 1243, sec. 76, the invalidity or badness of a rate or the fact that any of the preliminaries requisite for the due making of a rate have not been complied with cannot be relied upon to prevent recovery of such rate in a court of petty sessions. The order *nisi* now came on for hearing before Hood, J.

Irvine to show cause—Sec. 288 of the *Local Government Act* 1890 cannot apply as contended for by the other side. That section says:—"The invalidity or badness of the rate . . . shall not avail to prevent such recovery." But that section contemplates that a rate is in existence or has been made. I contend that here there is no rate in existence at all to which this section can apply. If it can be shown that there really is no rate at all, such objection can be taken in proceedings to recover the amount of the alleged rate. It is clear from the judgments in the case of *Warrnambool, Shire, etc., of v. Rawe* (a) that the proviso of sec. 288 is not so wide in its operation as is contended for. Some limitation undoubtedly exists. In *James v. Northcote* (b) it is laid down that a rate is a rate after it has been signed by three councillors. It is not a rate until the three councillors have signed the rate book as required by sec. 272; they, the three councillors, are authorized to make the rate in that way.

[HOOD, J. Sec. 256 says that the Council shall make the rate.]

But the rate is not in existence until signed by the three councillors, and such rate is invalid until so signed: *Lennon v. Evans* (c). That is an objection on the face of the rate itself, the signature being in 1898, while the rate purports to be payable in October 1893; the book should have been signed before the rate became due. By the terms of sec. 273 it is clear that the "rate" is the rate as appearing in the rate book, not the resolution of the council to make a rate. That section refers to

(a) [1884] 10 V.L.R. (L.) 347.

(b) [1895] 16 A.L.T. 185.

(c) [1870] 1 V.R. (L.) 133.

statement of the proposed rate and the rate immediately the same is made shall be open to the inspection of any person and any person may take copies from such statement or This rate is signed by persons who were not councillors at the time the rate was made, or rather at the time it purports to have been made payable.

Witchell referred to the case of *Menzies v. Newstead (d)*.] That is inconsistent with the decision in *Lennon v. Evans*; further, the rate was good on its face. The resolution of the council merely authorizes the rate to be made, but it does not constitute a rate which can be sued upon. You cannot sue against a proposed rate; the appeal must be from the rate actually made. A ratepayer has the right to say, when a rate is made, that there is no rate at all, and also to object to the alleged rate is bad on its face. Then the meeting held to confirm the making of the rate was not held four clear weeks before the first meeting.

Witchell then referred to the items on the ratepayers' book, and contended that the form given in Schedule No. 17 had not been followed.

Witchell to move the order absolute—Sec. 288 is a complete answer to both contentions. The Act gives ample protection to the ratepayer by allowing an appeal, and then to protect the ratepayer it has provided when the rate has not been confirmed by appeal that in a complaint "for the recovery of the rate from any person the invalidity or badness of the rate in whole or in respect to any part thereof shall not avail to prevent such recovery." That clearly means that the rate itself cannot be challenged—that is, as to its validity as a rate—and the objection here is that the rate is invalid. In *Menzies v. Newstead* the point is expressly decided. The facts show that the resolution was passed in December 1868, was payable in 1869, and the book was not signed until October 1869, when the rate was held good, and that the objection should have been taken by way of appeal. The rate is made by the resolution of the council. Sec. 272, in directing the transcription

(d) [1870] 1 V.R. (L.) 88.

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in the book and the signature by three councillors, speaks of "such rate" — that clearly assumes something already in existence. In the case of *Ballan, President, etc., of the Shire of v. Purtridge* (e) the rate was held good although the signatures of the persons did not purport to be signatures as councillors. The objection as to the meeting not being held four clear weeks after the first meeting is clearly not open as an objection.

[*Irvine*—But the complainant adduced evidence which showed that this defect existed; it was not brought out by the defendant.

Irvine referred to the case of *Brighton, Borough of, etc., v. Brougham* (f)].

The papers in the case of *Menzies v. Newstead* were produced from the prothonotary's office in order to ascertain whether the objection to the validity of the rate was apparent on the face of the rate or not; and His Honor, after perusing the papers, said that the defect was apparent on the face of the rate.

Cur. adv. vult.

HOOD, J. The defendant was sued in the court of petty sessions for the amount of a special improvement rate, but the case was dismissed upon an objection as to the validity of the rate. The complainant thereupon obtained an order to review, on the grounds that the rate is valid, but that, even if not, such an objection cannot be relied upon in the court of petty sessions. The view upon which the justices acted was that, as it appeared that sec. 179 of the *Local Government Act* 1890 had not been complied with, the whole rate was bad. A further point was taken. Sec. 272 of the *Local Government Act* requires that the rate should be transcribed into a rate book and signed by not less than three members of the council. On the face of the rate book it appears that the signature of the councillors was not obtained till about five years after the resolution as to the rate was passed, and it was contended that this rendered the rate a nullity.

(e) [1867] 4 W. W. & A B. (L.) 245. (f) *The Argus*, 8th July, 1864.

On this first point I consider that the view taken by the magistrates was correct. Sec. 179 is negative in form, and prohibits the council from doing anything by "special order," unless the resolution to do the same has been confirmed at a subsequent meeting held not sooner than four weeks after the first. The prescribed time had not elapsed before the confirmation in the present instance, and consequently the act of the council was illegal: See *Ex parte Taylor* (g).

As to the second point, it was contended for the defendant that, under sec. 272 of the *Local Government Act*, the signatures of the councillors must be affixed within a reasonable time, and that five years is not reasonable. Sec. 272 is curiously worded. It presupposes the existence of the rate. Then it enacts that such rate shall be transcribed into a book to be called the rate book. It next proceeds to treat the entry in the book as being the rate itself, for it gives the form of rate in the schedule, specifies the particulars it shall contain, and declares that "every such rate shall be signed," etc. From this it was contended that no rate exists till the book is signed, and this view receives support from the provisions of the following section. Even, however, supposing this to be correct, it does not assist the defendant, as there is nothing in the Act to imply that the rate shall not be valid unless the book is signed within a reasonable time. It was urged that if the rate was not made till the book was signed in 1898, it was invalid, because the rate was made payable in 1893, and therefore retrospective. In my opinion this is not correct, for this is not a retrospective rate, and even if it were it would not now be invalid. A retrospective rate is one made contrary to the express or implied intention of the Legislature for the payment of past debts, but there is nothing in our present *Local Government Act* to prohibit such a rate: *R. v. Oakleigh Shire* (h). So that, even if the rate be not made till the rate book is signed, the rate would still be recoverable. Nor would the ratepayer be aggrieved by a rate so made. He cannot, in this view, be sued till after demand (sec. 288), and if this contention is correct, such demand could not be made till the book was signed, as till then there would be no rate. Nor

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(g) [1885] 6 A.L.T. 170.

(h) [1884] 10 V.L.R. (L.) 67.

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would interest run against him from 1893, as was contended, would the rate become a charge on the land from that date because by sec. 64 of Act No. 1243 such consequences do not follow till the rates become due, and they certainly cannot become due till they are made, and probably not till a demand. So that I see nothing wrong with this rate on that ground, even from the defendant's standpoint, though I think that the rate is made when the resolution is passed—*Dinning v. Buninyong Shire* (i)—the word "rate" having evidence of different meanings in different sections of the Act.

But whatever may be the force of these objections, I propose to decide this case on the ground that the defendant was prevented from raising either of them in these proceedings. By virtue of secs. 1 and 75 of Act No. 1243, the provisions of the *Local Government Act* 1890 apply to the recovery of rates as at the present. Sec. 288 of the latter Act states that "no complaint or suit for the recovery of any rate from any person the invalidity or badness of the rate as a whole or in respect to any part thereof shall not avail to prevent such recovery." These words prevent a defendant from setting up in defence any facts which tend to show the invalidity of the rate. See *President, etc., of Warrnambool v. Rawe* (k). It was, however, contended that they allow him to take any objection appearing in the complainant's case, or at all events, on the face of the book. But there is nothing in the words themselves to suggest such a limitation. The section says that the invalidity "shall not avail to prevent such recovery," and I agree with Mr. Mitchell that the meaning of those words is that an invalid rate, unless appealed from, must be paid. An appeal is provided for by sec. 377, so that the rate as a whole may be tested, and it is intended that unless this were done the money should be recoverable. Before ever the words of sec. 288 appeared in the legislation, it was held that objections which form the subject-matter of appeal, and which are not apparent on the face of the rate, do not constitute a sufficient ground for resisting payment. See *Menzies v. Newstead* (l); *Lennon v. Evans* (m). The Legisla-

(i) *The Argus*, 4th April, 1865.

(k) 10 V.L.R. (L.) 347.

(l) 1 V.R. (L.) 88.

(m) 1 V.R. (L.) 133.

has now added the words to sec. 288, and in my opinion they cover any objection to the validity of the rate, no matter how or when it appears. This view is supported when it is remembered that by section 76 (5) of Act No. 1243 the Council may borrow money on the security of a special rate. The Council and the intending lenders may well wait a month for an appeal to test the validity of the rate, but after the lapse of that time they ought to be able to proceed without the risk of having the whole of the security destroyed when the money has been lent and the improvements made. Parliament meant that the ratepayers should not lie by and take the benefit of the improvements effected by the borrowed money and then repudiate their liability. In my opinion, therefore, the decision of the Court of Petty Sessions was erroneous. The order to review will be absolute, with costs; the decision below will be set aside, and a verdict entered for the complainants for the amount claimed.

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Rule absolute, with costs.

Solicitor for complainant: *Wilmoth.*

Solicitors for defendant: *Gillott, Bates & Moir.*

W. H. M.

HOWITT v. FITZGERALD.

Water Act 1890 (No. 1156), s. 4—Reservation of drain sold on Crown lands—Right of action—Statutory remedy—Easement—Implied grant—Drainage, right to—Easement on Crown lands.

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September 5, 30.

By sec. 4 of the *Water Act 1890* it is provided that "when any Crown land is conveyed and any stream creek race or drain flows through or over the land or the bed or channel of any disused stream race or drain is upon the land so conveyed although no reservation or exemption be contained in the Crown grant no person unless specially authorized by the Minister shall obstruct destroy or interfere therewith under a penalty not exceeding fifty pounds."

The plaintiff, the holder of a Crown grant, brought an action against the defendant claiming damages for the obstruction of a drain through his land contrary to the provisions of this section:

Held, that the provisions of the section constituted a mere statutory prohibition, and did not give the plaintiff any right of action for loss incurred through the breach thereof.

The rule of law that where the owner of two tenements sells them to two different persons at the same time the service which one tenement rendered to the

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other, if it were continuous and apparent at the time of sale, becomes permanent, and that the owner of the servient tenement cannot deprive the dominant tenement of the advantage theretofore possessed, is applicable to cases where the sale has been made by the Crown.

REFERENCE to the Full Court.

This was an action brought by the plaintiff, Maria R. Howitt, against the defendant, D. Fitzgerald, claiming damages for the obstruction of a drain, and an order that the defendant remove the said obstruction to the drain. The statement of claim alleged that the plaintiff was the owner in fee simple of allotments 1 and 2 of section B, in the parish of Wy Yung; that the storm and surface water which was on the land, and on the adjoining allotments to the south and east thereof, was prior to September 1896 accustomed to escape by means of a drain or watercourse flowing through the said allotments 1 and 2 and the adjoining allotments 3, 5, and 6 of the said section B. In the month of September 1896 the defendant wrongfully, and contrary to the provisions of sec. 4 of the *Water Act* 1890, and against the plaintiff's right to have the water flow in its accustomed course, obstructed part of the drain. In consequence of such obstruction the storm and surface water on the plaintiff's land has been and is unable to escape therefrom, and the storm and surface water on the adjoining allotments 3, 4, 5, and 6 was and is thrown back to the plaintiff's land, causing thereby considerable damage to the land. By the defence the defendant contended that the plaintiff was not entitled by easement, grant, or otherwise to the drainage of the storm and surface water on the land by means of any drain flowing through the said allotments 1, 2, 3, 5, and 6, or any of them; that he is not the owner of the adjoining allotments; further, that the only remedy, if any, open to the plaintiff would be under sec. 4 of the *Water Act*. The facts may be shortly stated as appearing in the judgment of the Court. The drain originated in a small cutting made by the plaintiff's husband in 1868 for the purpose of carrying off flood water from other land of his own. It was cut, with the consent of the Chief Commissioner of Police, over Crown land used as a police paddock, but the drain was not cut for any

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Crown purposes. Its dimensions and conditions varied from time to time. It was cleared out occasionally, and its course seems never to have been altogether obliterated. The land through which it ran, with other adjacent Crown land, was divided into allotments and sold by the Crown in June 1887. The plaintiff purchased from the Crown grantee two of the allotments then sold. In September 1896, after the plaintiff had purchased, the defendant blocked the drain in another of the allotments, which then belonged to his daughter. At the point where he blocked it the drain was then a well-defined water-course, and he filled it with logs and clay. The case came on for hearing before Williams, J., without a jury, and at the conclusion of the evidence the following questions were referred to the Full Court, and His Honor made the following finding of facts:— Questions reserved:—(1.) Whether the plaintiff has any cause of action under or by reason of sec. 4 of the *Water Act* 1890 and the Acts embodied therein? (2.) Or has any cause of action on an implied grant or reservation arising out of the fact that the respective allotments of land were sold and granted on the same day by the Crown to the respective purchasers with the drain running through allotments 1, 2, 3, 5, and 6. (3.) Whether the plaintiff is entitled to maintain the cause of action mentioned in reservation No. 2 on the pleadings as they stand. Findings:— (1.) I accept the plan and sections with their contents as correct. (2.) I find that the land was sold under the *Land Act* 1884, and that there was no permission by the Minister or Department to obstruct the drain which was on the land when sold. There was a third finding as to the effect of the stoppage, the learned Judge accepting the plaintiff's version as to the prejudicial effect thereof upon her land.

After the Court had delivered its judgment as first pronounced, counsel for the plaintiff raised the question that the inference drawn by the Full Court from the evidence was against the evidence, and the case was re-argued upon the question of fact. Judgment was reserved, and was on a subsequent day delivered in the form now appearing. It has not been considered necessary to set out the arguments upon the subsequent hearing.

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Cussen for the plaintiff—Sec. 4 (a) of the *Water Act* 18 was intended to be a statutory grant or reservation of an easement that the drains were to be left as they were when the Crown sold the land. That section was in the *Land Act* 18 No. 117, in the Act No. 145, in Act No. 360, and Act No. 8 and it was in the *Irrigation Act* of 1886. At the time of the consolidation of the statutes it was in the *Land Act* 1884 and in the *Irrigation Act* 1886, and since the consolidation it is the present *Water Act* 1890. Sec. 4 practically amounts to an express grant. There being a breach of a statutory duty, the plaintiff has a right to recover damages, notwithstanding the penalty enforceable under the section. The effect of the case on this subject is that the Court will look in each case at the intention of the Legislature, to see whether the individual is limited to the statutory remedy only: *Couch v. Steele* (1); *Atkinson v. Newcastle Waterworks Company* (c); *Ward v. Hobbs* (d); *Corporation of Raleigh v. Williams* (e). It does not matter whether the duty is imposed for public purposes primarily, if it be for private benefit: *Chamberlain v. The Chester and Birkenhead Railway Company* (f). Secondly, there is an implied grant or reservation arising out of the fact that these respective allotments were sold by the Crown with these drains upon them. The same implication will arise against the Crown as against an individual. It is really a question of construction. *Goddard on the Law of Easements* (4th ed.), p. 179, summarizes the effect of the cases thus—"T

(a) "Sec. 4. When at the time of any conveyance heretofore or hereafter made under Act No. 117 the *Land Act* 1862 the *Amending Land Act* 1865 the *Land Act* 1869 the *Land Act* 1884 or the *Land Act* 1890 any stream creek race or drain flows through or over the land so conveyed or the bed or channel of any disused stream race or drain or any dam or reservoir is upon the land so conveyed although no reservation or exception thereof be contained in the Crown grant of such land no person unless specially authorized thereto by the Minister shall obstruct destroy or interfere therewith under a penalty not

exceeding fifty pounds for every such obstruction or interference and every person who shall continue or shall fail to remove any such obstruction or interference shall incur a further penalty not exceeding fifty pounds for every day during which such obstruction or interference shall be continued or not removed after notice in writing. . . ."

(b) [1854] 3 E. & B. 402.

(c) [1877] 2 Ex. D. 441

(d) [1878] 4 App. Cas., p. 23.

(e) [1893] A.C. 540.

(f) [1848] 1 Ex. 870.

old rule that upon severance of an estate and in the absence of any express grant, those *quasi*-easements which the owner of the entirety has been accustomed to use for the beneficial enjoyment of the part sold over the part retained, if of an apparent and continuous character, will be given to the grantee by implied grant, but that similar easements cannot be reserved for the benefit of the part retained by implied reservation, has been almost swept away." See *Pyer v. Carter (g)*. In *Phillips v. Low (h)* a testator being seized in fee in possession of a house with windows and of an adjoining field over which the right of light required for the windows passed, devised the house to one, and the field to another, and it was held that the right to light over the field passed to the devisee of the house. The right to the flow of water is analogous to the right to light: *Bunting v. Hicks (i)*. If there is a convenience obviously useful to the so-called dominant tenement the easement will attach.

Counsel referred to the following cases:—*Taylor v. Browning (k)*; *Armory v. Delamirie (l)*; *Vaughan v. Benalla, Shire of, etc. (m)*.

Irvine for the defendant—It is not sufficient to show that there is a general duty created by sec. 4 of the *Water Act 1890*; it must be shown that the duty created was for the doing something for the particular benefit of the plaintiff. The classes of cases in which a liability may be established, founded upon a statute, are enumerated by Willes, J., in the case of the *Wolverhampton New Waterworks Company v. Hawkesford (n)*. Where there is a statutory duty created, and the mode of enforcing that duty is prescribed, that is the only mode to be adopted for breach of that duty; where a statute creates a benefit for a particular individual, the fact that a penalty is given for the breach does not deprive the individual of his right of action. There is a further limitation that in cases where the penalty goes to the person intended to be benefited his right of action

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(g) [1857] 1 H. & N. 916.

(h) [1892] 1 Ch. 47.

(i) [1894] 70 L.T. 455.

(k) [1885] 11 V.L.R. 158.

(l) 1 Sm. L.C. (8th ed.), p. 377.

(m) [1891] 17 V.L.R. 129.

(n) [1859] 6 C.B. N.S., p. 356.

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is taken away. By sec. 4 no such benefit is created for a particular individual ; there is merely a reservation in favour the Crown. In the case of *Stevens v. Jeacocke (o)* it is laid down that an action "will not lie for the infringement of a right created by statute when another specific remedy for infringement is provided by the same statute."

As to the second ground, the authorities cited do not apply to grants from the Crown; the rules of construction applying to grants by individuals have no application whatever to grants from the Crown. The rule of law relied on by the plaintiff rests upon the principle that a man cannot derogate from his own grant, but in cases where the Crown is concerned nothing is granted except the grant is in plain, unambiguous language. "That which the Crown has not granted by express, clear, and unambiguous terms, the subject has no right to claim under grant or charter:" *Feather v. The Queen (p)*; *Broom's Legal Maxims* (6th ed.), p. 560.

(Counsel was stopped by the Court.)

Cussen—In the case of *Dixon v. London Small Arms Co. (q)*, the case of *Feather v. The Queen* was considered, and it was held that its effect should not be extended. The defendant here claims the Crown's privilege, but an exception in favour of the Crown is to be implied in favour of the Crown alone. In obstructing this drain the defendant did not act as the agent or servant of the Crown, and because he is a Crown grantee he does not thereby become entitled to the protection afforded by the section in favour of the Crown. In the case of *Dixon v. London Small Arms Co.*, Lord Selborne said:—"It would be inconsistent with the grant to hold that the exemption of the Crown from this privilege can be imparted to a subject." The rule of construction does not apply to a case which is not a matter of construction at all, but which depends upon evidence to identify the thing that was sold. Then again, the rule is only to be applied to the extent that is necessary or desirable—that is, for the protection of the Crown or of someone on behalf of the

(o) [1848] 11 Q.B. 731, p. 741.

(p) [1865] 6 B. & S. 257, p. 283.

(q) [1876] 1 App. Cas. 632.

Crown. Thirdly, the rule does not apply at all to the circumstances of a Crown land sale in this colony.

Counsel referred to *Osborne v. Morgan* (r).

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Irvine—The only way in which the Crown can grant anything, except in so far as particular statutes enable it to do it in another way, is by matter of record: *Chitty on the Prerogative*, p. 389—"Crown Grants." There is nothing in the *Land Act* 1890, sec. 7, or in any preceding *Land Act*, which places Crown grants in a different position from grants under Crown manual or seal. The Crown only gives when it does so expressly. The question whether the general principles of Crown grants apply was considered in *Att.-Gen. v. Sitwell* (s). The principle is stated in *Chitty's Blackstone*, vol. ii., p. 347. This grant should be construed strictly. A strict construction is not limited to cases where valuable consideration is given: *Co. Litt.*, 352A; *Whistler's Case* (t); *Sir John Molyn's Case* (u). Assuming that the effect of sec. 4 of the *Water Act* 1890 is to reserve the drain and all rights in connection with it for public purposes, any interference with the drain will not give a right of action: *Garibaldi Co. v. Craven New Chum Co.* (v).

[A'BECKETT, J. The injury was not the same as in this case. The plaintiff was not injured.]

There the trespass, if any, was against the Crown, and the only redress was through the Crown. An implied grant can only arise from two things—(1) easement of necessity; (2) enjoyment and user as convenience. There is neither evidence of necessity nor of user. It was a police reservation.

[A'BECKETT, J. Howitt bought the land. It was drained by an artificial drain on Crown lands, and it might be said that the Crown at that time was using the drain to drain the land afterwards sold to Howitt.]

The fact that water flowed down the drain is not evidence of user. User must be by a person in the ordinary way in which land is enjoyed or used.

(r) [1888] 13 App. Cas. 227.

(s) [1835] 1 Y. & C. 559.

(t) [1612] 10 Rep. 63A.

(u) [1098] 6 Rep. 6A.

(v) [1884] 10 V.L.R. (L.) 233.

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Cussen referred to the following cases upon implied grant from the Crown collected in *Forsyth on Constitutional Law*, pp. 174, 187:—*Lord v. Commissioners of Sydney* (w); *Jewison Dyson* (x); *Duke of Beaufort v. The Mayor, etc., of Swansea* (y); *Doe d. Irvine v. Wilson* (z); *Falkland Islands Co. v. The Queen* (a); *Des Barres v. Shey* (b); *Turner v. Walsh* (c); *Treg v. Hunt* (d); *Polden v. Bastard* (e); *Canham v. Fiske* (f); *Phillips v. Lowe* (g); *O. W. Holmes, Common Law*, p. 383; *Chisholm v. Macaulay* (h); *Stevens v. James* (i).

Irvine referred to *Duke of Somerset v. Fogwell* (k); *Allen v. Taylor* (l); *Birmingham, Dudley, and District Railway Co. v. Ross* (m); *Rigby v. Bennett* (n); *R. v. Mayor, etc., of London* (o).

Cur. adv. vult.

A'BECKETT, J., read the judgment of the Court [MADDELL C.J., WILLIAMS and A'BECKETT, JJ.] The plaintiff seeks damages for injury to her land caused by the defendant filling up a drain which relieved it of the water that accumulated upon it in flood time and did damage unless allowed to escape through this drain. The drain originated in a small cutting made by the plaintiff's husband in 1868 for the purpose of carrying off flood water from other land of his own. It was cut, with the consent of the Chief Commissioner of Police, over Crown land used as a police paddock, but the drain was not cut for any Crown purposes. Its dimensions and condition varied from time to time. It was cleared out occasionally, and its course seems never to have been altogether obliterated. The land through which it ran, with other adjacent Crown land, was divided into allotments and sold by the Crown in June 1887. The plaintiff purchased from the Crown grantee two of the

(w) [1859] 12 Moo. P.C. 473, at p. 496.

(x) [1842] 9 M. & W. 540, 583.

(y) [1849] 3 Ex. 413.

(z) [1855] 10 Moo. P.C. 502, at p. 524.

(a) [1863] 2 Moo. P.C. N.S. 266.

(b) [1873] 29 L.T. N.S. 592.

(c) [1881] 6 App. Cas. 636.

(d) [1896] A.C., per Lord Macnaghten, p. 25.

(e) L.R. 1 Q.B. 156.

(f) [1831] 2 Cr. & J. 126.

(g) [1892] 1 Ch. 47.

(h) [1868] 7 N.S.W. R.L. 312, at p. 333.

(i) [1893] A.C. 162.

(k) [1826] 5 B. & C. 875, at p. 885.

(l) [1880] 16 Ch. D. 355.

(m) [1868] 38 Ch. D., p. 308.

(n) [1882] 21 Ch. D. 559.

(o) [1834] 1 Cr. M. & R. 1, at p. 1.

allotments then sold. In September 1896, after the plaintiff had purchased, the defendant blocked the drain in another of the allotments, which then belonged to his daughter. At the point where he blocked it the drain was then a well-defined water-course, and he filled it with logs and clay.

The plaintiff's rights, as asserted in her statement of claim, are based, firstly, on sec. 4 of the *Water Act* 1890, which provides that "when any Crown land is conveyed and any stream creek race or drain flows through or over the land or the bed or channel of any disused stream race or drain is upon the land so conveyed although no reservation or exception be contained in the Crown grant no person unless specially authorized by the Minister shall obstruct destroy or interfere therewith under a penalty not exceeding Fifty pounds."

It is contended that the case falls within the principle of *Couch v. Steel* (p); that the plaintiff, whose land benefited by the drain, was a person for whose benefit the statutory prohibition against interfering with it was intended, and was entitled to sue for damages caused by the infraction of the prohibition, just as the sailor plaintiff in *Couch v. Steel* was entitled to sue as a person for whose benefit the statutory obligation to keep a supply of medicine on board ship was created. The correctness of the decision in that case has been questioned, and there is no inclination in the courts to extend it: See *Atkinson v. Newcastle Waterworks Co.* (q). It would be a considerable extension of the principle to apply it to the present case, which is one of prohibition of interference with a right reserved to the Crown. *Stevens v. Jeacocke* (r) is an authority in which the facts more nearly resemble those now before us. There a statutory prohibition against fishing in a particular manner was disregarded, and a fisherman thereby deprived of his turn to fish brought his action, and it was held that the action would not lie. For these reasons we hold that the plaintiff has failed to sustain her first ground of action.

The second, raised in argument though not expressly raised by the pleadings, is of an entirely different character, depending

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(p) 3 E. & B. 402.

(q) 2 Ex. D. Div. 441.

(r) 11 Q.B. 731.

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on the existence of a *quasi* easement at the time when the plaintiff's allotments and the allotments through which the drain ran were sold by the Crown. It is contended that there was then a continuous and apparent easement over the lands through which the drain ran, entitling the Crown grantee of the allotments which afterwards became the plaintiff's to have the drain kept open over the other allotments by virtue of the well-recognized principle applied to ordinary vendors who subdivide and sell property one part of which can only be fully enjoyed by exercising rights over another part. Rights of this class are described in *Gale on Easements* as derived from the disposition of the owner, who has chosen to subject one of his tenements to a burden for the better enjoyment of another tenement. He can alter this disposition as he pleases while he remains owner of both, but if he sells the two tenements to two different persons at the same time the service which one rendered to the other, if it was continuous and apparent at the time of the sale, becomes permanent, and the owner of the servient tenement cannot deprive the dominant tenement of the advantage theretofore possessed. As it is contended that this rule, which holds good in sales by subjects, cannot hold good in sales by the Crown, it is desirable to look closely to see how the Court works out the result which secures the enjoyment of easements thus created without any words describing them.

The question generally arises in applications for an injunction to restrain interference with the easement asserted. The Court looks into the facts subsisting at the date of conveyance, and if in the case of interference with light, for example, it finds that at this date a house stood on the boundary of one allotment with windows opening on vacant land on the adjoining allotment it restrains the owner of the adjoining allotment from building on the vacant space so as to obstruct the passage of light to these windows. It does not profess to find in the words of the conveyance any reference to an easement of light, nor does it resort to any fiction of presumed grant, but construing the conveyance with regard to the condition of the property conveyed, it holds that the easement passed as part of the property described in the conveyance.

In the old case of *Compton v. Richards* (s), in which a right to light thus acquired was in question, Wood, B., said :—" I consider Dr. Compton claiming here a right by grant, and when the house was granted to Auriol, the plaintiff's lessor, he became grantee of everything necessary to its enjoyment as much as if it had been said at the time that no one should obstruct the light which it then enjoyed." In *Phillips v. Low* (t), a case in which the question was as to the mutual rights of two devisees of two adjoining properties with regard to a claim for light, Chitty, J., said :—" The question, then, may be stated in this simple form. A man being seized in fee in possession of a house with windows and of an adjoining field over which the light required for the windows passes, devises the house to one and the field to another; does the right to the light over the field pass to the devisee of the house or is the devisee of the field entitled to block up the windows? If the owner of the house and field by deed for value grant the house but retains the field it is settled law that a right to the light required for the enjoyment of the house passes to the grantee. Why? The reason stated in *Palmer v. Fletcher* (u), the leading case on the subject, is that the lights are a necessary and essential part of the house. In other words, what is conveyed is not a mere brick or stone building, with apertures called windows, but a house with windows enjoying light. This is the broad, substantial reason which commends itself at once to the common-sense of mankind. Worked out somewhat more technically, the conveyance operates as an implied grant of the light. Blocking up the windows by the grantor is regarded as an attempt on his part to derogate from his grant—a form of expression which assumes that the right to light has passed to the grantee. The implication does not necessarily arise upon a mere perusal of the deed itself; the implication of grant arises *prima facie* so soon as the facts are ascertained. On these facts being known, and in the absence of any other special circumstances, the law imputes to the parties an intention that the easement of light should pass with the house by virtue of the grant."

(s) [1814] 1 Price 27.

(t) [1892] 1 Ch. 47.

(u) [1615] 1 Levinz. 122.

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Such being the reasoning on which the Court proceeds in these cases, we see nothing at variance with the legal maxims applicable to the Crown, or derogatory to its dignity or interest, in giving the same construction to grants from the Crown made under similar circumstances. There is no reason for refusing to draw the same inferences from facts where the Crown was vendor as would be drawn in a similar case where the subject was vendor.

The case of *Lord v. Commissioners for the City of Sydney (v)*, shows that facts extrinsic to a Crown grant may be regarded in determining what passes by it. There it was held that a grant of land described as bounded by a creek passed the soil of the creek *ad medium filum aquæ*, as the description of boundaries did not exclude that portion of the creek which, by the general presumption of law, would go along with the ownership of the land on the banks of it. It was contended that as this was a Crown grant it could not be construed by intendment, but according to the express terms of the grant, for nothing can pass by implication in a Crown grant. Sir John Coleridge, in dealing with this contention in his judgment, observes—"Their Lordships are clearly of opinion that upon the true construction of this grant the creek where it bounds the land is *ad medium filum* included within it. In so holding they do not intend to differ from old authorities in respect to Crown grants, but upon a question of the meaning of words the same rules of common-sense and justice must apply whether the subject matter of construction be a grant from the Crown or from a subject. It is always a question of intention to be collected from the language used with reference to the surrounding circumstances."

The surrounding circumstances referred to are manifestly those existing when the grant was made. Crown lands are not excluded from general legal presumptions which arise from facts. The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user of a way by the public, whether the land belongs to the Crown or to a private

owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may, and indeed ought, to be presumed : *Turner v. Walsh* (w). After long possession under an uncertain Crown grant a confirmatory grant from the Crown may be presumed : *Des Barres v. Shey* (x). We have therefore arrived at the conclusion that if a continuous and apparent user of the drain existed when the allotments were sold by the Crown the grant of the plaintiff's land would have given the grantee the easement which she claims.

We delivered judgment in this case on the fifth day of September, and after deciding one of the points of law raised in favour of the plaintiff on a certain view of the facts, we expressed an opinion as to those facts adverse to the plaintiff. We were then asked to reconsider the case, as there was no distinct reservation on any question of fact, and the plaintiff had supposed, from the form of the second reservation, that the facts had been found in her favour. The effect to be given to the second reservation, and the inferences which should be drawn from the evidence, assuming that the point was not concluded by the second reservation, had certainly not been fully argued, and there had been no argument as to whether the second reservation amounted to a finding as to the condition of the drain at the time of the land sale. Feeling, therefore, that our conclusion on the question of fact, which was drawn solely from the evidence as set out in the notes, might have come somewhat as a surprise upon the parties, we consented to rehear the case on the effect of the second reservation and of the evidence in relation to it. Having heard arguments on both points, and the Judge who tried the case having informed the Court that he was at the hearing prepared to give credit rather to the evidence which enhanced the character of the drain in question than to the evidence which tended to minimize it, we think that there is evidence, on which the primary Judge may act, that this drain, as constructed on the Crown land sold, was before and at the time of sale in use as an obvious, well-defined, and continuous drain, and serviceable for the purpose of an outlet by

(w) App. Cas., at p. 639.

(x) 29 L.T. N.S. 592.

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means of which flood waters escaped from the flooded land. Assuming the primary Judge to find this fact in the plaintiff's favour, we think that there was a continuous and apparent user of the drain at the time when the allotments were sold by the Crown sufficient to create an easement within the principle of the authorities to which we have referred. We therefore answer the questions submitted by the case as follows:—

1. No.

2. An implied grant did arise from the fact referred to in question 2, assuming that such fact means that at the time of the sale by the Crown the drain was apparent and its use obvious for the purpose for which it had been originally constructed.

3. Yes.

Solicitors for the plaintiff: *Boothby & Giles.*

Solicitors for defendant: *Rogers & Rogers.*

W. H. M.

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September 30.

Hood, J.

[IN CHAMBERS.]

KING v. RING.

Practice—Damages—Assessment—Appearance—No defence—“Rules of Supreme Court 1884”—Order XXVII., r. 4—Order XXXVI., r. 11—Order XIII., r. 5.

Where in an action for damages for breach of promise of marriage the defendant entered an appearance, but did not file a defence:

Held, that under Order XXXVI., r. 11, the defendant is entitled to notice of the assessment of damages.

APPLICATION in Chambers.

The action was for the recovery of damages for breach of promise of marriage. The defendant had entered an appearance, but had not filed any defence. On 2nd September, 1898, Hood, J., made an order under Order XXVII., r. 4, directing that the damages should be ascertained by the Prothonotary. An order was now sought that the time and place for the proceedings before the Prothonotary should be fixed.

L. F. S. Robinson* for the applicant—The practice is unsettled. The question is whether Order XXXVI., r. 11, applies.

That rule seems to apply only to the assessment of damages at some sittings of the Court. The Prothonotary may himself fix the time and place.

Cur. adv. vult.

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HOOD, J. This was an action for breach of promise of marriage. The defendant entered an appearance, but did not file a defence. Thereupon the plaintiff applied under Order XXVII, r. 4, for a direction that the damages should be assessed before the Prothonotary. That order was then made, but the Prothonotary has raised the point that in cases where appearance has been entered the defendant is entitled to notice of trial in the ordinary way. Order XXXVI, r. 11, provides that notice of trial should be given in ordinary cases, the only exception being under Order XIII, r. 5, and that rule refers to cases where there has been no appearance entered, so that the exception points clearly to a distinction between the cases where appearance has been entered and where it has not. This objection is also supported by the form of the notice App. B., No. 16, which runs thus :—"Take notice of [trial of this or of the issues in this ordered to be tried] [or inquiry for the assessment of damages in this] by a Judge [and jury of men] [or as the case may be] for the next assizes [or sittings] at " and so contemplates a third case in addition to trial by Judge and trial by jury, viz., the assessment of damages where defendant does not defend. In my opinion the point is a good one. The defendant may have no defence, yet he is entitled to be heard on the question of damages.

I uphold the Prothonotary's objection, and the result is that I must fix a day for hearing four weeks from to-day. The case will be then heard before the Prothonotary. Notice must be given to the defendant, so that if he thinks fit he may attend on the assessment of damages.

Solicitor for plaintiff: *A. D. J. Duly.*

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September 6.

BIGGS v. KELLY AND ANOTHER.

Trial—"Rules of the Supreme Court 1884"—Order XXXVI., r. 3—*Right to a jury*
—*Equitable relief, claim to*—*Alternative claim for damages.*

The plaintiff in an action asked for a declaration that the defendants were trustees for him of certain shares, and for a transfer of the shares to him, and in the alternative claimed 50,000*l.* damages.

Held, that this was a cause or matter within Order XXXVI., r. 3, as being one heretofore within the cognizance of the Court in its equitable jurisdiction, and that a Judge in Chambers was right in refusing the plaintiff a jury in such an action.

THIS was an appeal from an order of Williams, J., sitting in Chambers. The order was made on a summons taken out by the plaintiff that the action be tried before a Judge with a jury. Williams, J., held that under Order XXXVI., r. 3, he had a discretion, and dismissed the summons. From that order the plaintiff now appealed.

By the statement of claim it appeared that in the year 1892 negotiations were going on between the defendants and the Mount Lyell Gold Mining Company for the acquisition of its property. It was agreed between the plaintiff and the defendants that in consideration of the plaintiff using his best efforts to effect the sale they would give him 1500 shares in a new company to be formed. In pursuance of this agreement the plaintiff did all things necessary to fulfil his part of the agreement, and the sale took place. A new company was formed, but the defendants, in breach of the agreement, refused to transfer the 1500 shares. Alternatively the plaintiff said that the defendants or the defendant Kelly was a trustee for the plaintiff in respect of 1500 shares aforesaid, and in breach of trust appropriated the same and dividends thereon. It was further alleged that in respect of the 1500 shares 750 were allotted to the defendants, or to the defendant Kelly, on payment of 5*s.* per share. Afterwards the Mount Lyell Gold Mining Company became the Mount Lyell Mining and Railway Company Limited, and the defendants, or the defendant Kelly, had issued to them 2250 fully paid-up shares, and 750 more shares were issued in respect of the 2250 upon payment of 3*l.* per share.

The plaintiff claimed :

1. A declaration that the defendants or alternatively the

defendant Kelly is a trustee for the plaintiff in respect of the 3000 shares, and that a transfer should be ordered on payment by the plaintiff of 5s. on 750, and 3l. on 750.

2. Alternatively 50,000l. damages for breach of the agreement to allot to the plaintiff the original 1,500 shares.

3. A claim for accounts and inquiries.

The defendants denied the agreement and raised certain questions of law.

The Attorney-General (Isaacs) and Mitchell for the plaintiff (the appellant)—The learned Judge was wrong in holding that this case came under Order XXXVI., r. 3, which is as follows:—“Causes or matters heretofore within the cognizance of this Court in its equitable jurisdiction shall be tried by a Judge without a jury unless the Court or a Judge shall otherwise order.” We say that though this may appear in form an equitable action, the real cause of action is a common law one, a claim for damages.

[A'BECKETT, J. You ask here for what formerly only a Court of Equity would give you.]

We would not have got our damages in an Equity Court.

[HOOD, J. You have framed your case as an equity one; it is not the cause of action which you may have, but the one which you have brought which we have to consider.]

Amoretty v. City of Melbourne Bank Limited (a) is in our favour.

Duffy and Coldham for the defendant Kelly.

Bryant and Cussen for the defendant Orr.

Counsel for the defendants (the respondents) were not called upon.

Mitchell, however, asked the permission of the Court to file an affidavit setting out the fact that the plaintiff had amended his pleadings.

(a) [1887] 8 A.L.T. 218.

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[PER CURIAM. We should decide the case on the pleadings in the appeal.]

It would save the parties expense if the amended pleadings were looked at.

A'BECKETT, J., delivered the judgment of the Court (A'BECKETT, HODGES, and HOOD, JJ.) We are of opinion that in this case the matter is one of procedure, and whatever course we might take, or whatever latitude we might allow as to filing additional affidavits in other cases, we think in this case that we ought to dispose of the matter on the materials which were brought before the learned Judge who made the order appealed from. When we look at those materials we find the plaintiff, who asserts the right to have the case tried before a jury, asking, first, for a form of relief which is a matter clearly within the cognizance of a Court of Equity, and which only a Court of Equity could have given before the *Judicature Act*. The relief sought by way of damages is merely an alternative claim to the equitable one. We accordingly think the defendants are entitled to treat the case as one in which a Court of Equity could have granted equitable relief, and therefore we think the order made below was correct, and the appeal will be dismissed, with costs.

Solicitors for plaintiff: *Hamilton, Wynne & Riddell*.

Solicitors for defendant Kelly: *Attenborough, Nunn & Smith*.

Solicitors for defendant Orr: *F. G. Smith, jun.*

A. F. M.

HEALEY v. BANK OF NEW SOUTH WALES.

F.C.

1898

September 22.

*" Rules of the Supreme Court 1884 "—Order XIX., r. 27—Order XXV., rr. 2, 4—
Striking out pleadings tending to embarrass or delay fair trial of action—
Questions of law, trial of.*

Upon an application under Order XIX., r. 27, to strike out certain paragraphs of a defence on the ground that they tend to prejudice, embarrass, or delay the fair trial of an action, where such paragraphs raise a debatable point of law the Judge will not decide whether the contention of one side or the other is correct. The proper procedure is to raise the question of law in the reply, and to make an application to have the point of law set down for hearing before the trial under Order XXV., r. 2.

APPEAL from decision of Hodges, J.

This was an appeal from a decision of Hodges, J., in Chambers. The plaintiff brought an action against the Bank of New South Wales, claiming a certain sum of money alleged to have been lent to the bank, the money having been paid in to the plaintiff's account upon his opening an account with the defendant. The defence contained the following allegations material to this report:—

" Paragraph 6. Prior to the opening of the said account as aforesaid the plaintiff conspired, with two other persons—namely, one S. Leonard, otherwise called Joyce, and one R. Reid—to cheat and defraud the Government of New South Wales of divers large sums of money, being part of the moneys belonging to the Crown in New South Wales. Paragraph 7. The moneys with which the plaintiff opened the said account, and which he paid into the said account, were the same moneys, or part of the moneys, of which he (in conjunction with the said other persons) so cheated and defrauded the Government of New South Wales. Paragraph 8. On or about the 5th July 1893 the plaintiff was duly convicted by a Court of competent jurisdiction in New South Wales for having so conspired as alleged in paragraph 6 hereof, and was duly sentenced to a certain term of imprisonment."

The plaintiff took out a summons to strike out paragraphs 6, 7, and 8, upon the grounds set out in the judgment of the Full Court. The summons came on before Hodges, J., who refused to strike out the paragraphs upon such application.

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The plaintiff then appealed to the Full Court.

Geoghegan for the appellant—No such defence as the present can be found in any book, nor can any authority be produced in support of it.

Counsel then cited authorities dealing with the legal aspect of the appeal.

I. A. Isaacs, A.G. (with him *Irvine*), for the respondent—The Court will not decide an important point of law on an application of this nature. The Court will not try a demurrer under Order XIX., r. 27. There is a proper procedure provided for the trial of points of law raised by way of demurrer under Order XXV. The striking out of pleadings as embarrassing is a matter of discretion in the Judge, and, as a general rule, no appeal from his order will be entertained: *Golding v. Wharton Saltworks Co. (a)*.

Counsel then referred to the legal contention in support of the defence, and was stopped by the Court.

Geoghegan in reply—If I can show that this matter now pleaded can never be tendered as evidence the application should be allowed.

[WILLIAMS, J. The objection raised by the respondent seems fatal. The point raised is open to argument, and we should not at this stage take upon ourselves to dispose of the merits of the defence.]

If it can be clearly shown that the defence is not capable of being sustained, the plaintiff is entitled to have it struck out; the retention of immaterial facts is embarrassing: *Davy v. Garrett (b)*.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HOOD, JJ.] This is an appeal from an order made by Hodges, J., in Chambers. An application was made in Chambers by summons apparently under Order XIX., r. 27, to strike out certain paragraphs of the defence.

(a) [1876] 1 Q.B.D. 374.

(b) [1877] 7 Ch. D. 473.

on the ground that they tended to prejudice, embarrass, and delay the fair trial of the action, and this is the ground also taken in the notice of motion by way of appeal to this Court. The application and the notice of appeal apparently were framed in view of the order referred to. The paragraphs attacked were 6, 7, and 8; the appeal deals with 8 alone, but it is necessary to read them together to understand paragraph 8. (His Honor read the paragraphs.) Hodges, J., decided that this was not a matter which he could deal with under Order XIX., r. 27, as it was a debatable matter, and therefore he refused to strike it out. We think he was right. We express no opinion as to whether the matters stated in this paragraph afford a good ground of defence or not. It may be that the plaintiff's contention may turn out to be right; we express no opinion, whatever, but we say that the defence raised is a defence upon which a great deal of argument may be addressed by both sides, and under this rule of this order we are not to decide whether the contention of the one side or the other is correct. It may be that the defence will show that the moneys which the plaintiff seeks to recover have become revested in the Crown. It may be that it is a necessary part of the defence to show that the plaintiff has been prosecuted to conviction for defrauding the Government of New South Wales of these moneys. The proper way to raise this question appears to us to be to raise it as a question of law, and in the reply to state that the paragraphs complained of afford no answer in law to the plaintiff's claim. The plaintiff could then proceed under Order XXV., r. 2. It is quite open to the plaintiff to obtain an order from a Judge that this question of law may be set down and disposed of before the trial of the action. If the Judge thought that the introduction of this matter might prejudice the plaintiff at the trial, it might be a reason for his making this order that the question of law should be first decided. It is in reference to that method of procedure that Order XXV., r. 4, is made. If these paragraphs were frivolous, then, though they might not be said to prejudice the fair trial, yet if they were clearly frivolous they could be struck out under rule 4. If, however, the application to the Judge in the Court below had been made under that rule, I

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think that it is very improbable that he would have granted it. Speaking for myself, I should not strike the paragraphs out under either rule, because I think that the matter raised is very debatable, and should be disposed of in the mode already suggested. The appeal will be dismissed, with costs.

Appeal dismissed.

Solicitor for plaintiff: *Geoghegan.*

Solicitors for defendant: *Malleson, England, & Stewart.*

W. H. M.

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BUCKNALL v. COUSINS AND ANOTHER.

County Court Act 1890 (No. 1078), s. 134—Appeal without stating special case—Points of law raised at trial.

By sec. 134 of the *County Court Act 1890* any party to an action in the County Court may appeal to the Supreme Court by motion instead of by special case, provided that at the trial of such action the Judge at the trial has, at the request of either party, made a note of any question of law raised at the trial and of the facts in evidence in relation thereto and of his decision thereon.

In an action of detinue the defence raised at the trial was that the goods were not the property of the plaintiff. The evidence in relation to such defence was fully taken, but beyond noting the defence raised the Judge took no note of any point of law raised, and the Judge decided that the goods were the property of the plaintiff.

Held, that the defendant was entitled to appeal by way of motion under sec. 134, and that the provisions of the section had been fully complied with.

THIS was an appeal from the County Court, from a decision of His Honor Judge Molesworth. The plaintiff sued the defendants for detinue, and the defence was that the goods were not the plaintiff's. The learned Judge took a note of the defence, but not of any point of law, and decided, after hearing the evidence, that the goods were the property of the plaintiff. The defendants then appealed.

Pigott to show cause—There is a preliminary objection to the Court dealing with this appeal. This appeal is brought under sec. 134 of the *County Court Act 1890*, and a discussion of the whole matter is not allowed under that section: the appellant cannot appeal on the facts, but is limited to the points of law raised and noted by the learned Judge at the request of the parties at the trial. It does not appear here that any note

of any question of law has been made. The appellant should have proceeded under sec. 133 of the statute. *Ratcliffe v. Allen* (a) is the only case where the two sections are held to be co-extensive. The later cases recognize the distinction I urge: *Jones v. Ebsworth* (b); *Watson v. Issell* (c); *Schofield v. Duguid* (d).

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Wanliss to move the rule absolute—The section has been sufficiently complied with. The point of law is raised by the fact that on the evidence the Judge found that the goods were the goods of the plaintiff; that is a point of law, and this Court has now before it the question of law, and the decision of the Judge on that, and his decision of the action. I rely on the decision in *Seymour v. Coulson* (e). Cotton, L.J., says, at p. 366, that “it is enough if the point of law appears to have been raised at the trial before the Judge of the County Court, and it is sufficiently raised if the Judge necessarily decided it in order to arrive at a conclusion.”

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] (His Honor dealt with the facts of the case, and enumerated the proposed terms of settlement of the matters in dispute.) There is another matter which must be referred to. A preliminary objection was taken to our dealing with this appeal on the ground that it should have been brought under sec. 133 of the *County Court Act* 1890, and not under sec. 134. The objection was founded upon the terms of sec. 134, which provides:—“And at the trial or hearing of any such action in a County Court the Judge at the request of either party shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto and of his decision thereon and of his decision of the action suit matter or other proceeding. . . .”

It has been held in this Court, and the English authorities are to the same effect, that the request of either party is not necessary; that it is not a condition precedent. That is clearly estab-

(a) [1886] 12 V.L.R. 580.

(b) [1887] 13 V.L.R. 346.

(c) [1890] 16 V.L.R. 607.

(d) [1890] 16 V.L.R. 618.

(e) [1880] 5 Q.B.D. 359.

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lished, and therefore the only question remaining is, has the Judge made a note of the question of law raised at the trial and of the facts in evidence in relation thereto and his decision thereon? Mr. Wanliss cited the case of *Seymour v. Coulson* (f) which shows that all this has been done in this case. For instance if the defence is raised, as it has been here, that the property in the goods sought to be recovered was not the property of the plaintiff (the plaintiff suing in detinue) and the Judge holds that the goods were the property of the plaintiff, and the evidence is before us in relation to that point, and shows us clearly that the goods were not the property of the plaintiff, then there is a question of law sufficiently raised at the trial, sufficiently noted by the Judge within the decision referred to, and also we have the Judge's decision thereon, and, as I say, all the facts in evidence in relation thereto. Therefore I should say that the provisions of sec. 134 have been fully complied with.

Solicitors for appellant: *Fink, Best & Hall*.

Solicitors for respondent: *Hughes & Permezel* (for *Green & Sandford, Bairnsdale*).

A. F. M.

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 September 19.

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[PRACTICE COURT.]

SUTHERLAND v. COOLEY; HARRIS AND TELFORD, CLAIMANTS.

Instruments Act 1890 (No. 1103), ss. 167, 169—Stock mortgage, registration of—Proof of registration—Signature of Deputy Registrar-General—Valuation of consideration—Particulars of consideration inaccurately stated—Power of Court to amend informalities—Justices Act 1890 (No. 1105), s. 146.

The Court cannot take judicial notice of the signature of the Deputy Registrar-General, and an indorsement by him upon the back of a stock mortgage of the receipt of a memorial of the document is not evidence of registration without proof of the signature.

The inaccurate recital in the deed itself of the consideration for a stock mortgage does not render the mortgage void if the transaction be *bond fide* and if in reality valuable consideration was given.

On the return of an order *nisi* to review the decision of justices, the Court has power under sec. 146 of the *Justices Act 1890* to amend a slip in the proceedings before the justices by permitting additional evidence to be called.

ORDER *nisi* to review.

This was an order *nisi* to review the decision of the Court of

(f) 5 Q.B.D. 359.

Petty Sessions at Wycheproof, whereby in certain interpleader proceedings the claim of the claimants Harris and Telford was barred. Judgment was obtained by one J. Sutherland against P. Cooley, and upon execution being issued the claimants claimed the property seized under and by virtue of a stock mortgage. Upon the hearing of the interpleader summons, a stock mortgage purporting to be made between P. Cooley and his wife of the one part, and Harris and Telford of the other part, was put in evidence. The stock mortgage bore the following endorsement:—"Received into the office of the Registrar-General of the colony of Victoria at Melbourne the 9th day of July 1895 a memorial of the within document numbered 1077 and verified by Albert Armytage Holdsworth of clerk to Mr. B. P. R. Rymer of" Then followed the signature "Edward Barrett" and under the signature the printed words "Deputy Registrar-General." The facts material to this report are sufficiently set out in the judgment. At the close of the claimants' case the solicitor for the execution creditor objected that no proof had been given that the stock mortgage had been duly registered. The stock mortgage contained the following statement of the consideration:—"In consideration of the sum of 218*l.* 18*s.* 6*d.* lent advanced and paid by the mortgagees to the said mortgagors the receipt whereof the said mortgagors do hereby acknowledge." The justices made an order barring the claim, and the grounds of their decision are quoted in the judgment. The claimant obtained this order *nisi* to review such decision upon the following grounds:—" (1.) That the stock mortgage is valid. (2.) That the consideration for the said stock mortgage is not improperly stated therein. (3.) That even if the consideration is improperly stated in the said stock mortgage the said stock mortgage is not thereby invalidated. (4.) That the consideration for the said stock mortgage was not exhausted by the renewal of the bills of Bridget Ellen Cooley before the said stock mortgage was given."

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Cussen to show cause—There was no proof that the stock

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mortgage was registered. The mere production of the mortgage with the indorsement is not the way to prove registration, and the Court cannot take notice of the signature of the "Deputy Registrar-General." A stock mortgage is not registered like a bill of sale—a memorial has to be registered, not the deed itself, and this memorial has to contain certain particulars: Sec. 169 of the *Instruments Act* 1890. In *Teague v. Farrell* (a) it was decided that the Court cannot take judicial notice of the Deputy Registrar-General. The case of *The Union Finance, etc., Co. v. Woolcott* (b) decided that the Court could recognize the signature of the "Acting Registrar-General," but the Court did not purport to overrule *Teague v. Farrell* as to the deputy. There is no evidence that any particulars were lodged as required by sec. 169, and the production of the mortgage itself does not in any way prove the registration of the particulars.

HOOD, J. I think it would be better to argue this point before going into the question of the consideration for the mortgage.

Isaac A. Isaacs, A.G. (with him *Wanliss*) to move the order absolute—The whole object of sec. 167 is to prove that the document itself has been received, and if it bears the indorsement by the proper officer of the receipt of the memorial then that is evidence of registration, and if evidence of registration it is *prima facie* evidence of proper registration. Sec. 167 provides that "every such receipt so indorsed and signed shall be taken and allowed as evidence of the registration of such mortgage or agreement and of the time when the registration took place." In *Teague v. Farrell* the document was not put in evidence, but when once the document is in evidence the indorsement is *prima facie* proof of proper registration. The other side should have objected to the want of proof of the signature of the Deputy Registrar-General before the document was put in.

[HOOD, J. I am inclined to agree with Mr. Cussen as to the insufficiency of the proof of the registration, but I have power to cure this defect.]

(a) [1880] 6 V.L.R. (L.) 480.

(b) [1889] 15 V.L.R. 504.

Cussen—The Act does not give power to amend a proof of this description when the decision of the justices is practically right upon the evidence as it stands.

Counsel then argued the question of the validity of the mortgage.

The following cases were cited:—*Hutton v. Goldsbrough, Mort and Co (c)*; *The Victorian Farmers' Loan Company v. Lindo (d)*; *Elder, Smith and Co. v. M'Kellar (e)*; *Yit Tie Shee v. Mee Shue (f)*.

HOOD, J. The question in this case is whether or not an indenture made 5th July 1895, between Patrick Cooley and B. E. Cooley on the one part and Harris and Telford on the other part, is valid or otherwise. The document is a stock mortgage, and has to be registered under Part. VIII. of the *Instruments Act* 1890. The case was heard in the Court of Petty Sessions at Wycheproof, and at the hearing the justices decided against the validity of the stock mortgage, and the mortgagees obtained this order *nisi* to review. The first objection taken here in answer to this order *nisi* was that, though the stock mortgage was put in evidence, there was no evidence of its proper or due registration. On the outside fold of the document is indorsed a receipt, which recites that a memorial of the within document had been received in the Registrar-General's office on the 9th June, and it is signed "Ed. Barrett," and under that is printed "Deputy Registrar-General." The objection is taken that the Court could not take judicial notice of this signature, because it is not one mentioned in the *Evidence Act* relating to the power of the Court to take judicial notice of certain official signatures. That appears to be a good objection; but it was contended in answer that the only objection taken to the document at the hearing was that the indorsement was not evidence of due registration. I think the objection was taken to the full extent. The document was originally put in as a stock mortgage between the parties, and nothing was said about registration until the end of the claimant's case; then

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(c) [1892] 14 A.L.T. 84.

(d) [1893] 19 V.L.R. 599.

(e) [1895] 21 V.L.R. 664.

(f) [1896] 17 A.L.T. 203.

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the objection was taken and overruled, and, I think, wrongly overruled. However, the registration of that document is a matter about which there can be ultimately little or no dispute, and I feel disposed to cure the error by exercising the powers under the *Justices Act*. I think the powers given are extensive enough to cure almost any defect, and I have never felt any hesitation in exercising them in order to cure what I think is a mere slip. However, in view of the order I propose to make, it will not be necessary to cure that defect.

The second objection was that the magistrates were in error in deciding that this document was invalid. The solicitor, in his affidavit in reply, states that "the bench agreed with my contention as to the inaccurate statement of consideration in the stock mortgage, and that the true consideration therefore was insufficient, and that forbearance to sue (if any) had been exhausted by the acceptance of the renewal of promissory notes before the stock mortgage was signed." But a stock mortgage, according to decision, is perfectly valid if there was in reality a good consideration, and in reality it was given *bond fide*, although the document carrying out the arrangement does not accurately recite the true consideration. In this case the consideration is wrongly recited. The deed recites as the consideration "21*lb.* 18*s.* 6*d.* lent advanced and paid by the said mortgagees to the said mortgagors." As a matter of fact that is an error; there was a debt due by one of the mortgagors to the mortgagees for the price of goods sold and for the price of land sold; but the other mortgagors owed nothing, and no money was ever lent, advanced, or paid to either of them. The consideration for the mortgage was a promise by the mortgagees to the mortgagors to carry them on over the harvest—that is, to supply them with goods until after the harvest, and not in the meantime to enforce the mortgage. That is a perfectly good consideration, and I cannot see anything in the evidence to show that the transaction was not *bond fide*. That being so, the mortgage was given *bond fide* and for valuable consideration, and, according to the case of *The Victorian Farmers' Loan Co. v. Lindo*, that

mortgage would be perfectly good although the consideration is wrongly set out in the deed. The magistrates, I think, were in error in holding that the inaccurate statement vitiated the instrument or that the true consideration was insufficient, and I think they were also in error in holding that the acceptance of the renewed promissory notes exhausted the forbearance. I do not know exactly what they mean by such an expression. If it means, as I suppose it does, that a promise to forbear during the currency of the renewed promissory notes would not be of any value, then I think they are wrong, as the fact that the promissory notes were renewed would be forbearance. I think, however, it is a case which should be retried. It is a peculiar case. The male mortgagor states that he joined in the mortgage and endorsed the bill of exchange really as though it was a matter of grace done to please the mortgagees. I think an opportunity should be given to the person attacking the transaction to see whether the document has been properly registered and to inquire into the whole transaction. The applicant is right on one point but wrong on the other, and I shall therefore give no costs. The order will be made absolute, without costs, and the case remitted to the justices.

Solicitor for claimants: *Newman*.

Solicitors for execution creditor: *Bruce & Robinson* (for *Crothers*, Wycheproof).

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IN RE FERGIE.

Insolvency—Insolvency Act 1897 (No. 1513), s. 113—Sequestration of estate of deceased person—Estate unable to pay its debts—Act of insolvency—Insufficiency of materials for order nisi—Objections, right to take.

The estate of a deceased person may be sequestrated by a petitioning creditor upon the allegation that the estate is insufficient to pay its debts, and upon proof of such allegation under the provisions of sec. 113 of Act No. 1513.

In the affidavit filed in support of a petition the defendant alleged that according to his information and belief the estate was unable to pay its debts, but did not state any grounds for such information and belief. The order *nisi* contained the statement by the Judge that "it has been proved to my satisfaction that the estate is unable to pay its debts." Upon the return day of the order *nisi*, the party opposing the order applied for and obtained an adjournment, and then upon the hearing of the adjourned application took the objection that the order was granted on insufficient materials, no ground of defendant's belief and information being stated.

Held, that the materials upon which the order *nisi* was granted were not open to such an objection under such circumstances.

Semble, the rules made under the *Insolvency Act* (No. 1513) by the Judges of the County Court are not applicable to proceedings in the Supreme Court.

THIS was an application for the sequestration of the estate of H. P. Fergie deceased. The petition, which was presented on behalf of the Commercial Bank of Australia Limited, contained the following statement:—"That the estate of the said H. P. Fergie is, according to your petitioner's information and belief, insufficient to pay its debts." The affidavit by the general manager of the petitioning creditor contained a similar allegation, no ground of such information being set out. The order *nisi* recited the allegation that the estate was insufficient to pay its debts, and further recited—"And upon reading the affidavit of H. G. Turner sworn and filed herein and the allegations contained in the said petition having been proved to my satisfaction." Upon the return day of the order *nisi* the executor appeared to oppose the order, and upon his application the hearing was adjourned. At this application for the adjournment no objections were raised as to the form of the order *nisi*.

Schutt for the executor of the estate of Fergie to show cause—On the face of the petition no act of insolvency is disclosed; and, secondly, there is no proof that the estate is unable

to pay its debts. By sec. 113 of Act No. 1513 a person may have the estate of a deceased person sequestrated "in manner provided by the *Insolvency Acts*." By sec. 43 of Act No. 1102 the order *nisi* must set out the nature and amount of the debt, and the act of insolvency relied upon. Sec. 113, sub-sec. (1) does not make inability to pay debts an act of insolvency by itself. Then by sub-sec. (2) of that section there must be proof that the estate is unable to pay its debts. The affidavit merely states that according to the manager's "information and belief" the estate is unable to pay the debts. No grounds for such information and belief are stated: *Gilbert v. Endean (a)*. The statement in the order *nisi* that this has been proved to your Honor's satisfaction does not prevent you from now giving force to the objection. There are certain rules made under Act 1513, but they are made by the Judges of the County Court, and are not of any effect so far as the Supreme Court jurisdiction is concerned. The Judges of the Supreme Court have power under the Act to make rules.

Woolf, for the petitioning creditor, to move the order absolute—The forms and rules given and prescribed by the new Act have been followed.

[HODGES, J. I have nothing to do with them in this court; they are for the practice of another court.]

The order *nisi* is good on its face, and objections cannot now be taken as to the materials upon which it was made: *In re Ritchie (b)*; *In re Fitzpatrick (c)*; *In re Dionisio (d)*. That has been recognized as the practice of the Court for many years. It is too late now to take advantage of this technical objection, inasmuch as the application was adjourned at the request of the other side, and no right was preserved at the time to object to the form of the proceedings.

HODGES, J. This was an application to sequester the estate of a deceased person on the ground that the estate is insufficient to pay its debts.

(a) [1878] 9 Ch. D. 259.

(c) [1884] 10 V.L.R. (I.) 6.

(b) [1882] 8 V.L.R. (I.) 1.

(d) [1888] 14 V.L.R. 326.

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The objection has been raised that that is not a sufficient ground. It is contended that there must be the allegation and proof of the allegation that there has been an act of insolvency within the meaning of the Insolvency Statute. In my opinion that objection is not well founded. Sec. 113 of Act No. 1513 provides that—"Any creditor or creditors of the estate of any deceased person whose debt or debts would have been sufficient to support a petition for sequestration against such deceased person had he been alive may in manner provided by the *Insolvency Acts* petition to have the estate of such deceased person placed under sequestration as insolvent." Mr. Schutt argued that the words "may in manner provided by the *Insolvency Acts*" meant that the petition must contain all the statements which are requisite under the old *Insolvency Act*—not only the "manner" but the substance of the petitions must be followed. I think the words indicate "manner" only. Then sub-sec. (2) of sec. 113 indicates what must be the foundation of the petition; it must be a petition containing a statement and referring to a proof that the estate is insufficient to pay its debts. In my opinion that is a substitute for the act of insolvency in previous statutes, and therefore that objection is not sustainable.

It was next contended that the petition did not contain a statement or allegation that this estate was unable to pay its debts, that the affidavit does not prove that it was unable to pay its debts, and that all the petition and affidavit stated was that according to the deponent's information and belief it was insufficient to pay its debts. I am inclined to think that if my attention had been called to this at the time of presentation I should not have made the order *nisi*. I will not be positive that my attention was not so called, but my recollection is that it was not. However, it does not make much difference, as I have to consider now whether I can give effect to that petition. Curiously enough, the order *nisi* contains the statement or allegation that the petition does say that the estate was insufficient to pay its debts, and the order goes on to say that that has been proved to my satisfaction. I am afraid that that is the order, and the order stating that

this has been proved to my satisfaction, I am inclined to think on the authorities I cannot go behind the order. Whether I would be *now* satisfied is another matter. There is another answer: this is purely a technical objection; it is technical in this sense, it is to the form of the affidavit. It is not that there is no affidavit, but that the form is not sufficient, that the person should have stated the grounds of his belief. As this is a technical objection I think it was waived when the adjournment was asked for and obtained, as no rights were preserved when I allowed the adjournment. I am not clear whether the order *nisi* is what can be regarded as a final order—that is, a judgment—and whether consequently “belief” may not be stated as in an interlocutory application. A final judgment is when the order absolute is being made, and when that is being made a party has a chance of dealing with it. This is made on what may be called a preliminary application to show cause why a final order should not be made, and the other side has a right to put the applicant to the proof of his allegations. Then would come the proof, and then would come the final order, and if he does not take his objection then I think that that objection goes because it is technical. Even if it was not gone I doubt whether that was a final application, and therefore whether the objection under any circumstances is a good one.

Order absolute.

Solicitors for petitioning creditor: *P. D. Phillips & Son.*

Solicitor for executor of estate: *Fergie.*

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[IN CHAMBERS.]

IN RE THE REGENT'S PARK COMPANY LIMITED.

Company—Winding up—By the Court—Voluntary winding up—Creditor—Companies Act 1890 (No. 1074), ss. 86, 131.

A compulsory winding-up order against a company will not be granted *ex debito justitiae* on the application of a creditor of the company where a voluntary winding up is being proceeded with and it appears that the creditor's rights are not endangered by the voluntary winding up.

A creditor of a company in voluntary liquidation applied for a compulsory winding-up order. The application was refused, but, under the circumstances, an order was made that the winding up should be continued under the supervision of the Court.

PETITION under Part I. of the *Companies Act* 1890 by the Trustees Executors and Agency Company Limited (a creditor) to wind up compulsorily the Regent's Park Company Limited.

The following facts were stated in the petition and verified by affidavit of the manager of the Trustees Company:—By instrument of mortgage dated 7th February 1891 the Regent's Park Company Limited mortgaged to Edward Green Snowden, John Pratt, and Orlando Fenwick, for the term of three years from the date of the mortgage, a piece of land at Collingwood, to secure an advance of 3000*l.* By another instrument of mortgage, dated 14th April 1893, the same company as mortgagor mortgaged, for three years from the date of the mortgage, another piece of land at Collingwood to the same persons as mortgagees to secure an advance of 900*l.* On the 9th December 1897 Orlando Fenwick died. On 21st July 1898 Pratt and Snowden transferred the instruments of mortgage to the Trustees Executors and Agency Company Limited, and notice in writing of the transfer was given to the Regent's Park Company on the 22nd August 1898. The principal moneys were wholly unpaid and an amount of 559*l.* was due for arrears of interest. On 19th July 1898 the manager of the Trustees Company wrote to the secretary of the Regent's Park Company as follows:—"Referring to your letter of 14th inst., and to our interview this day, in view of the fact that your company is unable to pay the arrears of interest, which at penal rate amount to over 400*l.*, we think steps should be taken to call a meeting for the purpose of

winding up the company." To this letter the manager of the Regent's Park Company replied on the 21st July 1898 :—" My directors (who held a meeting to-day) wish me to inform you that instructions have been given to the company's solicitor to convene an extraordinary meeting of the shareholders of the Regent's Park Company Limited to further consider your letters of 14th and 19th ult."

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The solicitor of the Regent's Park Company stated on affidavit that as solicitor of the company he attended a meeting of members of the company duly convened by notice dated 5th September 1898, and held in accordance with the company's articles at its registered office, on 14th September, when extraordinary resolutions were passed that the company be wound up, and that Frederick W. Danby be appointed liquidator for the purposes of the winding up, and be paid as remuneration in respect thereof 5*l.* 10*s.* and all fees actually paid out of pocket. Notice of the extraordinary resolutions was advertised in the *Government Gazette* of 16th September 1898. Danby accepted the liquidatorship. On the 7th September he informed one of the petitioning creditors' solicitors that the meeting of 14th September was to be held. The petition now before the Court was dated 8th September 1898.

The petitioning creditor objected to the nomination of a liquidator by the shareholders of the debtor company, and it was suggested that an *employé* of the Trustees Company should be appointed. It was stated by the creditor's solicitors in a letter to the debtor's solicitors, dated 15th September, that when informed of the meeting of 14th September they did not understand that a meeting at which the company would be placed in voluntary liquidation forthwith had been called, but one only to consider its position in view of the fact that a writ to recover the amount due had been served upon it. The petition now became returnable before Hood, J.

Neighbour for the petitioner—The order should be made *ex debito justitiæ*. It lies upon the debtor company to show that the petitioner can get nothing if the compulsory order be made : *Palmer's Company Precedents* (6th ed.), vol. ii., pp. 34, 752. The

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principle is stated in *Bowes v. Hope Society* (a); *In re Chapel House Colliery Co.* (b); *The General Rolling Stock Co. Ltd.* (c). Here there is no proof that the compulsory winding-up order is worthless.

Cussen for the liquidator—The Court will not make the order unless the creditor shows that he will be prejudiced by the voluntary winding up: *Companies Act* 1890, sec. 131; *In re New York Exchange Ltd.* (d); *In re Russell, Cordner & Co.* (e). The suggestion of the company's solicitor that the matter should be adjourned is reasonable.

Neighbour in reply referred to *In re Krasnopolsky Restaurant, etc., Co.* (f); *In re West Hartlepool Co.* (g); *Companies Act* 1890, secs. 76, 86.

HOOD, J. A creditor of a limited company is entitled either to get his debt paid or to have the company wound up by the Court as a general principle; but there are several important exceptions to this, one of which arises when there would be no possible advantage to the creditor in directing that an order compulsorily winding up the company should be made. In the present case, beyond the question of costs and the appointment of a particular liquidator I can see no advantage to the creditor in making such an order. The company is at the present time being wound up, and the uncalled capital is about to be called up in the ordinary way and distributed among the creditors of the company. No attempt has been made to impugn the honesty of the winding-up proceedings or to say that the liquidator already appointed is unfit, or that he will not act properly in the liquidation and as well as any other person appointed by the Court. The creditor has got his winding up—the company has already given him what he now asks the Court to give him. The company has commenced to wind up its business, and that

(a) [1865] 11 H.L.C. 389, per Lord Cranworth.

(b) [1883] 24 Ch.D. 259, per Bowen, L.J., p. 270.

(c) [1865] 34 Beav. 314.

(d) [1888] 39 Ch.D. 415.

(e) [1891] 3 Ch. 171.

(f) [1892] 3 Ch. 174.

(g) [1875] L.R. 10 Ch. 618.

is all it can do. I ought, therefore, to refuse the application. That position is amply supported by the authorities cited by Mr. Cussen, and is not opposed by any of those referred to by Mr. Neighbour. In addition there is the *Companies Act* 1890, sec. 131:—"The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up." This clearly implies that if the Court is of opinion that the rights of the petitioning creditor are not prejudiced the prior voluntary winding up should stand. To make the order now asked would be to incur extra costs for no purpose. I feel, however, that there is something behind all this contest, and I therefore propose to make an order which will meet the case. I will make no order as to the compulsory winding up asked for, but order the voluntary winding up to be continued under the supervision of the Court, with liberty to the creditor to make any application he may be advised. I think the petitioning creditor is entitled to his costs, and they ought to be paid out of the assets of the company.

The petition will be dismissed so far as it relates to a compulsory order, but a supervision order will be made upon the voluntary winding up. The respondent is to pay the petitioning creditor's costs out of the assets of the company. The liquidator in the voluntary winding up will get his costs out of the assets of the company.

Solicitors for the petitioning creditor: *Price & Price.*

Solicitors for the Regent's Park Company: *Snowden, Neave & Demaine.*

R. H. C.

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REGENT'S PARK
COMPANY
LIMITED.
Hood, J.

1898
September 20.

Hood, J.

[IN CHAMBERS.]

ZWICKER v. KRONHEIMER AND ANOTHER.

Practice—Discovery in aid of execution—Defendant—"Party entitled"—"Rules of Supreme Court 1884"—Order XLII., r. 32—Costs.

A defendant in whose favour a judgment for costs has been entered is a "party entitled" within the meaning of Order XLII., r. 32.

It is not necessary, upon an application under this rule, to show that the applicant has made an attempt to obtain satisfaction of his judgment.

APPLICATION on summons for an order under Order XLII., r. 32.

On 13th May 1896 judgment for the defendants, with costs, was given in an action by Leo Zwicker against Joseph Kronheimer and Theodore Zwicker. Final judgment was entered on the 15th May 1896, and pursuant to such judgment the costs of the defendant Theodore Zwicker were duly taxed at 163*l.* 4*s.* 10*d.* This sum was alleged to be "still wholly due and unsatisfied." It was now sought by the defendant Theodore Zwicker, upon affidavits showing the above facts, to obtain an order that the plaintiff attend before a Judge or before an officer of the Court and be orally examined as to his means of satisfying the judgment, and that he produce his books of account at the examination. The summons asked also that the plaintiff pay the costs of the application and of the summons.

Eagleson for the applicant—Only a preliminary order is now asked.

(Counsel was stopped.)

Wasley for the plaintiff—The Court will not make this order on behalf of a defendant. Order XLII., r. 32, is taken from sec. 216 of the *Common Law Procedure Statute* 1865, but the powers given by that section have been extended. Under that Act an examination as to a debt only could be ordered. The applicant should be a creditor. The word "creditor" means a person to whom a debt was owing before the judgment was obtained: *Cf. Gilchrist v. Gilchrist (a)*.

(a) [1893] 19 V.L.R. 735.

[HOOD, J. The words here are "party entitled."]

There is no evidence that any attempt has been made to obtain satisfaction of the judgment: *Carney v. Duffus* (b); *Edwards on Execution*, p. 65. The costs are in the Judge's discretion, and should be reserved until the examination is held.

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Eagleson in reply—If necessary, a supplementary affidavit can be filed, showing that the applicant has endeavoured to obtain satisfaction of the judgment. The summons should ask for costs.

Counsel referred to *Patterson v. Doyle*, *Annual Practice*, 1898, p. 805.

HOOD, J. I think the defendant in this case is a "party entitled" to enforce a judgment or order, and is therefore within the meaning of rule 32 of Order XLII., and that the materials upon which this application is now made are sufficient. The absence of any statement in the affidavit to the effect that execution has been issued by the present applicant, and returned unsatisfied, or of any paragraph to the like effect, is matter to be considered only when dealing with the question of costs. If the judgment creditor could have obtained satisfaction of his judgment in any way other than by the present application it is reasonable to assume he would have done so. I can see nothing in the rule requiring such information to be given. I reserve the question of costs until after the examination has been taken.

I shall order that an examination be taken before the Chief Clerk.

Application allowed.

Solicitors for the plaintiff: *Maddock, Johnson & Jamieson*.

Solicitors for the defendant, Theodore Zwicker: *Pavey, Wilson & Cohen*.

R. H. C.

(b) [1893] 14 A.L.T. 216.

1898
September 22.

Hodges, J.

[PROBATE JURISDICTION.]

IN THE ESTATE OF GIBNEY.

Administration—Rule to administer freehold land—Administration Act 1872 (No. 427)—27 Vict., No. 230, s. 4.

A rule to administer the real estate of a person who died intestate before the passing of the *Administration Act 1872* (No. 427), may be granted, even though a rule to administer the personal estate of the deceased has already been granted to another person.

In re Wilkinson (5 V.L.R. I. 64) followed.

MOTION.

One Gibney died intestate before the *Administration Act 1872* (No. 427) came into force. A rule to administer the personal estate of the intestate was granted to James Gibney. An application was made by Eliza Gibney, widow of the intestate, to the Registrar of Probates for a rule to administer the real estate.

The Registrar asked why the same person should not be appointed to administer to both real and personal estate. It was alleged by the widow that James Gibney had been guilty of a breach of trust. The Registrar, being of opinion that one person only should administer to the real and personal estate, refused the application, and suggested that the applicant should obtain first a rule to revoke the grant to James Gibney, and then apply for a grant to herself of administration of the whole estate. It was alleged by the applicant that the whole of the personal estate had disappeared. The matter now came before the Court.

Cussen for the applicant—*In re Jones* (a) is not against the present application. The practice of appointing one person as administrator of both real and personal estate is merely for convenience. A revocation of the grant to James Gibney will do no good. The applicant intends to bring an action against him for maladministration. By Act No. 427 the Legislature showed a general intention in cases of intestacy that one person should represent the deceased for all purposes. That Act repealed Act

(a) [1882] 8 V.L.R. (I.) 48.

No. 230. Notwithstanding the repeal Molesworth, J., said he would continue to grant rules to administer: *In re Wilkinson* (b); *In re Ewing* (c). There is no statute, but merely the policy of the law, which requires that the same person should administer both real and personal estate. Until the Act 427 was passed freehold lands were kept distinct from all other property. That Act brought all property into the same net: *Administration and Probate Act 1890*, secs. 5, 6, 7.

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Hodges, J.

HODGES, J. I think I may grant this motion. I assume that the affidavits show that it is undesirable that the brothers should administer the real estate. The Act No. 230, under which a rule to administer was granted, has been repealed, and now there is not any Act under which this can be done.

Cussen—Molesworth, J., granted administration as if a rule to administer had been granted. The Act only applied to matters arising out of deaths occurring after that Act came into force.

HODGES, J. *In re Wilkinson* is a direct authority for granting a rule to the brother, and therefore I think I can grant it to the widow. I grant administration in the form in which it was granted in that case.

Motion granted.

Solicitors for applicant: *Croft & Rhoden*.

R. H. C.

(b) [1879] 5 V.L.R. (I.) 64.

(c) [1880] 6 V.L.R. (I.) 93.

1898
September 30.

Hood, J.

[IN LUNACY.]

IN THE MATTER OF ELIZA PROUT.

The Lunacy Act 1890 (No. 1113), ss. 134, 213—Lunatic—Maintenance—Notice.

In applications under sec. 134 of the *Lunacy Act* for an order that the property of an alleged lunatic be applied towards that person's maintenance, notice of the intended application should be served upon the alleged lunatic.

MOTION under sec. 134 of the *Lunacy Act* 1890.

Eliza Prout was entitled under the will of her late father, Josiah Prout, to certain real and personal property. It was alleged that Eliza Prout was of unsound mind and incapable of managing her business affairs. The present application was made by the executors and executrix of Josiah Prout for an order that they be at liberty to apply the estate of Eliza Prout for her maintenance. The alleged lunatic was and had been in the custody of her mother, the executrix of Josiah Prout, since the latter's death, and it was desired she should continue in the same custody. No notice of the application had been given to Eliza Prout.

L. S. Woolf to move.

Hood, J. I think in an application of this nature I should act with the utmost care. It is sought to take away from a person alleged to be a lunatic her estate. I think she ought to have notice of the application, and that such notice should be served by some person other than and independent of the relatives of Eliza Prout.

Solicitor for applicants : *Rigby*.

R. H. C.

RIDER v. FREEBODY.

CANTY v. BRUSSELS.

CANTY v. MILLER.

CANTY v. BAKER.

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review—"Person aggrieved"—Informant—Justices Act 1890 (No. 1105),
41, 154—Article of food—Sale—Nature and composition—Health Act
(No. 1098), ss. 43, 46.

words "person aggrieved" in sec. 141 of the *Justices Act* 1890 include an
at whose information has been dismissed by a court of petty sessions.
is effected "to the prejudice of the purchaser" within the meaning of
of the *Health Act* 1890 (No. 1098), when the purchaser is supplied with an
of food wholly different to the particular article demanded by him.

ORDERS TO REVIEW.

RIDER v. FREEBODY.

Henry Rider, an inspector of the Prahran municipality,
sued John H. Freebody, a grocer, in the Court of Petty
Sessions at Prahran, upon information under sec. 43 of the
Justices Act 1890, for having sold, to the prejudice of the
purchaser, an article of food—to wit, limejuice—not of the nature,
quantity, and quality demanded by the purchaser. Rider asked
for limejuice in Freebody's shop, in Chapel-street, Prahran, and
paid for a bottle of it. The "limejuice" so called was found
on analysis to contain about 96.4 per cent. of water and 2.9 per
cent. of citric acid. The justices dismissed the information, with
costs.

The further facts necessary to the report of this case may
be gathered from the judgment.

CANTY v. BRUSSELS.

CANTY v. MILLER.

CANTY v. BAKER.

In these cases the defendants were severally charged in the
Court of Petty Sessions, Melbourne, upon information under the
Offences Act 1890, sec. 40 (4), as occupiers of houses
rented by persons who had no lawful means of support.
The justices dismissed the several informations.

Orders to review these decisions obtained by the informants
were made for hearing before Hodges, J. It was objected by the

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defendant in each case that the informant was not a person "aggrieved" within the meaning of sec. 141 of the *Justices Act* 1890, and was therefore not entitled to move for an order to review. Hodges, J., referred the orders to the Full Court. Argument upon the objection was heard in all the cases at the same time.

Box (*Cussen* with him) to move the order absolute in the first case.

Isaac A. Isaacs, A.G. (*Finlayson* with him) to move the order absolute in the other cases.

Bryant for the defendant Freebody to show cause—The informant is not a "person aggrieved" within the meaning of sec. 141 of the *Justices Act* 1890. The governing words in the section are "aggrieved by summary conviction or by any order" (this means an order of a civil nature) "or against whom any warrant has been issued"—that is to say, a person may be aggrieved first by a conviction, second by a civil order, third where his liberty is affected.

[HODGES, J. Why should an order dismissing a civil matter be different from one dismissing a criminal matter?]

In the latter case a new trial cannot be had. This is what is asked here by the informant. "Order" is defined by sec. 4 of the *Justices Act*, but it is used with varying meanings throughout the Act. "Person aggrieved" is first used in Act No. 267, secs. 136, 151, the latter section being taken from 20 & 21 Vict., c. 42, sec. 2. The words "either party to the proceedings" are left out of, and the words "person aggrieved" inserted in, our Act. The object was not to affect third persons, but to limit the powers given. In *Davys v. Douglas* (a) the effect of sec. 2 of 20 & 21 Vict., c. 43, is discussed, and stress is laid upon the words "either party to the proceedings." In 6 & 7 Vict., c. 68, sec. 20, the word "aggrieved" is used. The general principle is shown in *Reg. v. Duncan* (b), viz., that the language destroying the fundamental principle must be clear.

(a) [1859] 4 H. & N. 180; 28 L.J.M.C. 193. (b) [1881] 7 Q.B.D. 198.

Counsel referred to *R. v. Meyer* (c); *Smith v. Union Bank of London* (d); *Exparte Sidebotham* (e), *Bankruptcy Act 1879* (Eng.) 32 & 33 Vict., c. 71, sec. 71; *R. v. Keepers of Peace of London* (f).

The object of the Act must be looked at, together with the definition: *In re Reed, Bowen & Co.* (g). *Exparte Walter* (h), referred to in *Exparte Sidebotham*, is practically followed in *In re Langtree* (i). A distinction is drawn between "person aggrieved" and "person affected": *Stokes v. Checkland* (k). A person dissatisfied is not necessarily a person aggrieved. An inspector is not a person who feels himself aggrieved within the meaning of sec. 141. He merely gets a statutory right to prosecute in certain cases.

[WILLIAMS, J. Would not the definition in *In re Reed, Bowen & Co.* affect this case?]

There is no criminal element in that case. Under the *Health Act 1890*, secs. 329, 331, the whole penalty, if recovered, goes to the municipal council. In *Attfield v. Box* (l) there was merely an order for the issue of a warrant. If the warrant does not issue the person desiring it is aggrieved. If no hearing has taken place the informant has a right to demand that the proceedings be heard and determined. He is then a "person aggrieved." By sec. 154 of the *Justices Act* a special remedy is given if the justices refuse to hear.

[A'BECKETT, J. Sec. 141 is a sort of drag-net. In *In re Reed, Bowen & Co.* the Judge is dealing strictly with a criminal appeal.]

Sec. 141 is a combination of secs. 1 and 4 of Act No. 571. The matter has been discussed, but not decided in our Courts: *Shillinglaw v. Taffs* (m); *O'Loughlin v. McCay* (n). If there is no right to review an acquittal the mere tacking on of an order for costs will not give the right.

[HODGES, J. An order to review is not like *certiorari*, a

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(c) [1875] 1 Q.B.D. 173.

(d) [1875] 1 Q.B.D. 31.

(e) [1879] 14 Ch. D. 458.

(f) [1890] 25 Q.B.D. 357.

(g) [1887] 19 Q.B.D. 174.

(h) [1876] 2 Ch. D. 328.

(i) [1894] 70 L.T. 738.

(k) [1893] 68 L.T. 457.

(l) [1886] 12 V.L.R. 7.

(m) [1898] 23 V.L.R. 525.

(n) [1898] 23 V.L.R. 650.

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bringing up of the proceedings below. It merely reviews them.]

Mitchell (*Purves*, Q.C., with him) for defendant Brussels to show cause—In this case no costs were awarded against the prosecuting constable. The Court treats the words “deemed to be a person aggrieved” as equivalent to “person aggrieved :” *Graves Case* (o).

[HODGES, J. The person in that case was really in the same position as any other member of the public.]

Counsel referred to *Powell v. Birmingham Vinegar Co.* (p); *Kennedy v. Purser* (q); *Reg. v. Keepers of the Peace* (r); *Burn's Justice* (30th ed.), p. 626.

Coldham for defendants Miller and Baker to show cause referred to *Rex v. Middlesex Justices* (s); *Davys v. Douglas* (t); *Drapers' Co. v. Haddon* (u); *Rex v. Oxford (Inhabitants)* (v); *Reg. v. Russell* (w); *Rex v. Reason* (x).

[HODGES, J. The *Justices Act* 1890, sec. 77 (17) seems to contemplate an appeal in a case of dismissal.]

The last case was followed in *Rex v. Smith* (y), cited in *R. v. Grover, ex parte Parsons* (z). Where a sufficient remedy by appeal is provided by statute, no other remedy will be allowed: *R. v. Fetherston, ex parte Roberts* (a).

[*Cussen*—An order to review is deemed an abandonment of the right of appeal.]

The *Justices of the Peace Act* 1865, sec. 150, limited an appeal to points of law and to an application for a case stated. As to what is an “order” within the meaning of Act No. 571, see *R. v. Webster, ex parte Collins* (b). In *In re Mercantile Bank, ex parte Millidge* (c), it is shown that when the word “order” is met with in a section it does not necessarily mean that the full

(o) [1869] L.R. 4 Q.B. 715.

(p) [1894] A.C. 8.

(q) [1898] 23 V.L.R. 530.

(r) 25 Q.B.D. 357.

(s) [1832] 3 B. & A. 936.

(t) 4 H. & N. 180; 28 L.J. M.C. 193.

(u) [1892] 9 *Times* L.R. 36.

(v) [1811] 13 *East*. 411.

(w) [1854] 3 E. & B. 942.

(x) [1795] 6 T.R. 375.

(y) [1800] 8 T.R. 588.

(z) [1881] 7 V.L.R. (L.) 334.

(a) [1886] 12 V.L.R. 159.

(b) [1878] 5 V.L.R. (L.) 101.

(c) [1893] 19 V.L.R. 527, at p. 533.

effect of the interpretation clause is to be given to it. It has been held that where a prohibition is asked for dismissal of a case is not an order: *Ex parte Schneider* (d).

Counsel referred to *R. v. Antrim Justices* (e).

Box in reply—The *Justices Act* 1890, sec. 141, decides the point.

[HODGES, J. The question is whether that section gives a right of appeal in a case of dismissal.]

The jurisdiction given by that section to the Court is to order a rehearing in every case where justices are wrong in law——

(Counsel was stopped.)

[PER CURIAM. We are with you independently of the question of the award of costs.]

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] In all these cases a preliminary objection was taken by counsel for the several defendants. The point raised is a very important one, and appears never to have been expressly decided in this colony. The objection, shortly put, is that there is no appeal in these cases under sec. 141 of the *Justices Act* 1890—in other words, that an order to review cannot be obtained under sec. 141 where the defendant to an information has been acquitted, and that the defendant, once he is acquitted by the justices, is secure, so to speak, from being harassed by further proceedings in relation to the same charge, and therefore this section does not cover the case of a review of the acquittal of a defendant or of the dismissal of an information against him. Whether that is a good objection or not depends upon the construction to be placed upon the first part of sec. 141, which is as follows:—"Where any person who feels aggrieved by the summary conviction or by any order of any Court of Petty Sessions or justice or against whom any warrant has been issued by any Court of Petty Sessions justice or clerk of petty sessions shows by affidavit to a Judge of the Supreme Court sitting in Court or

(d) [1872] 11 N.S. W.R. (L.) 100. (e) [1895] I.R. 2 Q.B. & Ex. 603.

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Chambers a *prima facie* case of error or mistake on the part of such court or such justice or clerk or that such court or such justice or clerk had no jurisdiction or authority to convict or make such order or issue such warrant or that the conviction order or warrant ought not in law to have been made or issued he may," etc.

The question involved is, whether the dismissal of an information against a defendant is included in the words "or by any order of any Court of Petty Sessions." Now, a number of English authorities have been cited to us upon this point. It may be said in reference to those authorities, at the outset, that the Court does not derive much assistance from them, because the point raised depends upon the construction of our own Act, and not only upon the construction of sec. 141, but also upon that of other sections of that Act. However, one or two of those English authorities show that the words "who feels aggrieved" are capable of including an appeal where a defendant to an information has been acquitted, or where a charge against a defendant has been dismissed. Thus, we get from the English authorities the definite view that these words are capable of including that event. I may specially refer to *Davys v. Douglas* (f). That was a case in which an appeal took place against an acquittal by magistrates, the information having been dismissed. The appeal was by way of case stated. The Act under which the point was raised in that case was 20 & 21 Vict., c. 43, sec. 2 of which provided that "after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made either party to the proceeding before the said justice or justices may if dissatisfied with the said determination as being erroneous in point of law, apply," etc. It was argued in that case that the section did not cover the case of an appeal where the justices dismissed the information, but the Court held that it did, and apparently so held on the ground that the section said "*either party* to the proceeding before the said justice or justices may if dissatisfied with the said determination

(f) 4 H. & N. 180.

as being erroneous in point of law, apply," etc. The Court appears to have held in that case that a determination included a determination in favour of the person charged, and that the informant may be a person "aggrieved" by the determination because the section said "either party to the proceedings." Those words, "either party," it is true, are not in our sec. 141, but the words in our section are "*any person* who feels aggrieved." In our local legislation prior to this, the form of expression used was "either party." That language has been departed from by Parliament in the present Act. No doubt that was done advisedly, and the Court thinks that the reason why the words "any person" were substituted for the words "either party" was to make the section more elastic, and the intention was not to limit the right of either litigant or of a person interested who might have a right to appeal and that far from the words being words of limitation they are words of expansion.

Then, in our own Act, it is clear that in sec. 77, sub-sec. 17, Parliament contemplated an appeal of the present description. That sub-section provides:—"If the Court dismiss such information or complaint such Court shall make an order of dismissal of the same and shall give the defendant in that behalf a certificate thereof signed by the adjudicating justices or one of them or by the clerk of the said Court if the same be demanded which certificate without further proof shall upon its production be a bar to any other information complaint action or legal proceeding in any Court *other than proceedings in the nature of appeal* for the same matters respectively against the same party." The important words are "other than proceedings in the nature of appeal." From those words, it is perfectly clear that Parliament contemplated the possibility, at any rate, of an appeal from an order of the Court of Petty Sessions dismissing an information.

Again, looking further back in the Act, we come to the interpretation section—sec. 4—which is very large in its terms. It is important on two points, first, as to the meaning of the word "order;" and, secondly, as to the meaning of the word "defendant." "'Order' shall include order adjudication de-

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cision grant or refusal of any application and determination of whatsoever kind made by justices of any court of petty sessions." Now, even stopping there, the words would be quite large enough to include the present case; but it goes on "and also any refusal by justices or any court of petty sessions to hear or determine any information or complaint or to entertain any application." Then, as to the word "defendant," the same section says "'defendant' shall include 'respondent' and any person opposing or duly served with notice of an application and any accused person." It is to be particularly observed that "defendant" is to include *any accused person*. Now, going back to sec. 141, and reading it in the light of sec. 77, sub-sec. 17, and of the interpretation section, it seems to indicate that the person who feels "aggrieved" by the order of any court of petty sessions can call upon the informant, complainant, or defendant, or accused person, or other party interested in maintaining any order of a court of petty sessions to show cause why the order should not be reviewed. Applying that view to the present case, we find that any party aggrieved by an order may call upon the accused or other party interested in maintaining the order to do so. What order would the accused have an interest in maintaining here? Surely the order of dismissal.

The conclusion we have come to is that not only was it contemplated that there might be an appeal from the dismissal of an information, but that under our Act that appeal is actually given in terms, and that "any order of a court of petty sessions" includes the determination of justices to dismiss an information, and that under the word "defendant" in that section is included the accused; and that if the order of dismissal which has been made in his favour is attacked by the informant, the latter is to call upon him as the person interested in maintaining the order of dismissal to show cause against its being upset. For these reasons we think that the preliminary objection is not well founded.

Objection overruled.

The orders to review were then argued severally, but the only case calling for a report is that of *Rider v. Freebody*.

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Bryant—The sale was not to the purchaser's prejudice within sec. 43 of the *Health Act* 1890: *Sandys v. Small* (g). As soon as he is told that the article or drug is not of the nature, quality, and substance of the article demanded, then the obligation is cast upon him of showing in what respect it is not pure.

[HODGES, J. If it is enough for defendant to show that the limejuice is a mixture sec. 46 of the *Health Act* 1890 is useless.]

Gage v. Elsey (h) is to the same effect as *Sandys v. Small*. When a purchaser knows that the spirits sold him are diluted the sale is not to his prejudice within sec. 43: *Morris v. Johnson* (i).

[A'BECKETT, J. If the article is not that which the purchaser asks for, is it enough that it contains a particle of that article?]

The proportion is referred to in *Sandys v. Small*. The informant is put upon inquiry. If the article is merely flavoured with limejuice that fact may be a ground of prosecution for adulteration.

Counsel referred also to *Reg. v. Fullarton* (k); *Webb v. Knight* (l).

Box in reply was not heard.

WILLIAMS, J., delivered the judgment of the Court. This was an order *nisi* to review a decision of the Court of Petty Sessions at Prahran, which was dismissed, with costs, on an information laid by Rider against Freebody. The information charges that the defendant did sell, to the prejudice of the said Rider, as purchaser, an article of food, to wit, limejuice, which was not of the nature, substance, and quality of such article of food demanded by the said Rider, contrary, etc. The ground of the order *nisi* is that the evidence given on the hearing of the information proved the offence with which the defendant was charged, and that the defendant should have been convicted. So, what we have to do is to see whether there was any

(g) [1878] 3 Q.B.D. 449.

(k) [1886] 12 V.L.R. 25.

(h) [1883] 10 Q.B.D. 518.

(l) [1877] 2 Q.B.D. 530.

(i) [1889] 6 *Times* L.R. 171.

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evidence upon which the justices could properly arrive at the determination at which they did arrive. For that purpose it is necessary to examine the evidence. The evidence is stated in the affidavit of Rider, the applicant for the order *nisi*. He states that he called at the shop of the defendant, and asked for a bottle of limejuice; that the bottle produced in Court was handed to him, and that he paid 6*d.* for it, and then stated that he had bought it for the purpose of analysis. He then states that Frederick Dunn, public analyst, was called, and that Dunn deposed that the contents of the bottle were not limejuice, but an artificial preparation, consisting of 96·4 parts of water (containing a small amount of essential oil, which gave the flavour of limes), three parts of citric acid, and small proportions of colouring matter and ash. Dunn added that the sample contained little, if any, genuine limejuice. Now, the defendant admits that this evidence is correct. He admits it in a curious way. He says, in his affidavit—"My solicitor also asked Mr. Dunn whether he would undertake to say that there was no limejuice in the sample, to which Dunn replied—'I will not say that there is not any.'" That amplified the previous statement of Dunn that the contents of the bottle were not limejuice, and that there was little, if any, limejuice in the bottle. Taking all the evidence, it amounts to this, that there might have been a few drops of limejuice in the bottle.

Now, under secs. 43 and 46 of the *Health Act* 1890, Mr. Bryant has raised two points. First, he says that the sale was not to the prejudice of the informant, because he got limejuice mixed with something else, and he had notice of the fact that he was not getting pure limejuice, but a mixture. Having regard to the authorities cited, that position would apparently be correct if the evidence supported it. But, in all the cases cited, the purchaser actually got the article for which he asked, though in a mixed state, and as he had notice of the fact of mixture, it was held that he was not prejudiced. The present case, however, differs in a very material way from the cases cited. In this case the purchaser does not get what he asks for. He asks for limejuice, and what he gets is something with a few drops of limejuice in it—possibly a very few drops, for the analyst says that there was

little, if any, limejuice in the bottle; he is asked in cross-examination whether he will swear that there is no limejuice, and he says he will not swear that there is not any. The purchaser, therefore, did not get the article which he demanded. He got something which was simply rubbish, and not limejuice at all. That fact gets rid of the authorities cited, and shows that the sale was to the prejudice of the purchaser.

Then, as to the second point, under sec. 46, that is disposed of by the evidence, for to protect the seller the label must state the nature or composition of the mixture. The label does not do that at all; it consists really of a series of advertisements, and to regard these as a statement of the "nature and composition" of the article would be obviously wrong.

The only further matter for notice is that the evidence shows that the ingredients were not added fraudulently to increase the bulk of the article, or to conceal its inferior quality (see sec. 43, sub-sec. 1). But in the view we take of the case these questions are immaterial, whether in relation to sec. 43 or sec. 46.

Sec. 43 requires that the purchaser should get the article he asks for, and the evidence shows that he did not get it. He got something quite different. The order will be made absolute, with costs, and the case will be remitted to the justices for re-hearing.

Solicitors for complainant Rider: *Herald & Roberts.*

Solicitor for complainant Canty: *Guinness, Crown Solicitor.*

Solicitors for defendant Freebody: *Westley & Dale.*

Solicitors for defendant Brussels: *Gillott, Bates & Moir.*

Solicitors for defendants Miller and Baker: *Gaunson & Stewart.*

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1898
September 30.

Hood, J.

[IN CHAMBERS.]

IN RE A. D. MICHIE, A SOLICITOR.

Solicitor—Taxation of Costs—Bill of costs—Withdrawal—Condition.

A solicitor when delivering his bill of costs to a client is not entitled to withdraw the bill if not paid and to send in a corrected account unless he at the time of delivery of the first bill makes clear to the client that the charges in the delivered bill are not enforceable.

In re Thompson (30 Ch. D. 441) applied.

APPLICATION on summons for an order that the bill of costs delivered by Archibald Donnelly Michie, a solicitor, to Ellen Turner, a client, be referred for taxation.

It was stated by the solicitor that the reason why he desired to withdraw the bill of costs if taxation were insisted upon was that he considered that one of the charges made by him in it was too low, the charge being made thus with a view to amicable settlement.

The further material facts may be gathered from the judgment.

C. J. McFarlane for the applicant—A solicitor delivering a bill is not entitled to withdraw it unless it is accompanied by a distinct intimation that some of the items are not taxable. *In re Thompson* (a); *In re Hopkins* (b). His letter accompanying the bill is a covert threat that if they insist upon taxation he will charge more money.

Eagleson for the solicitor—In *In re Hopkins* the delivery of the bill was unconditional. In *In re Thompson* payment within eight days was required. The letter meant that if the clients did not consider themselves bound by the bill another would be delivered.

[HOOD, J. It does not explain that the charges made are not enforceable. The statement is one which is not a condition. It says in effect "There is my bill; it is not for taxation."]

No case of hardship to the client has been shown.

(a) [1885] 30 Ch. D. 441.

(b) [1891] 17 V. L. R. 85.

HOOD, J. On 6th September of this year the solicitor sent in his bill of costs to his client accompanied by a letter in which occurs the following passage;—"As desired I send complete costs, including everything up to 27th July. The whole thing is made out on the basis of settling without disputes of any kind, or of the necessity of bringing others in, in which case more expense will be incurred. If my costs are to be taxed I reserve the right to withdraw the costs now sent, and send in a proper account." The whole question is whether a solicitor may impose these conditions, and I think the matter is completely covered by the authority referred to in argument: *In re Thompson (c)*. A solicitor, unlike an ordinary creditor, is not at liberty to send in a corrected account. He sends in his bill of costs, and is bound by it. But he may impose fair conditions. He could have said, as was suggested in the case referred to, "There is my bill. It is a bill which cannot be taxed because it includes items I cannot enforce against you. If you pay these items I am willing to take the amount of that bill." The client then, understanding his exact legal position, can say "Yea!" or "Nay!" But a solicitor is not entitled to say "There is my bill of costs! If you do not pay it I shall send in a larger bill for taxation." That being so, the summons will be allowed with costs. It may be a hard case, but with that I have nothing to do. The costs of this application to be costs in the reference.

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Summons allowed.

Solicitor for applicant: *C. J. McFarlane.*

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(c) 30 Ch. D. 441.

1896
October 19.

Hodges, J.

[PRACTICE COURT.]

GILL v. RYAN.

Practice—Affidavit—Commissioner—Deponent's solicitor—Instruments Act 1896
(No. 1423), s. 7.

The affidavit required by sec. 7 of the *Instruments Act 1896* was sworn before plaintiff's solicitor as commissioner. Defendant gave no notice of defence, but at the hearing objected to the affidavit. The Court of Petty Sessions then heard evidence, and made an order in complainant's favour.

Held, that the affidavit was irregular.

Held also that, the order being based upon the evidence taken in Court and not upon the affidavit in question, was good.

ORDER TO REVIEW.

Henry Rhodes Gill issued a summons under sec. 7 of the *Instruments Act 1896* in the Court of Petty Sessions at Dunolly to recover from Helena Ryan the sum of 28*l.* 10*s.* for money due on a promissory note made by the latter. The affidavit in support of the summons was sworn by Gill before Edward S. Herring, who acted as his solicitor in issuing the summons. The summons was returnable on the 10th August, 1898. The defendant gave no notice of defence. At the hearing the defendant's solicitor appeared and objected to the summons on the ground that the affidavit was sworn before the complainant's solicitor. The complainant did not appear. The justices adjourned the case in order to obtain the attendance of a police magistrate. On the 15th August 1898 the case was again heard, both parties appearing, and the same objection was taken by defendant to the affidavit. The Court disallowed the objection, and ordered the case to proceed. Evidence was then given in support of the complainant's case. No evidence was called by the defendant. The Court made an order for the amount claimed, with 1*l.* 6*s.* costs.

An order *nisi* to review this decision was obtained on the ground that the affidavit on which the summons in the matter was issued was sworn before the solicitor for the complainant.

Schutt to move the order absolute.

Wasley to show cause—Evidence was given to prove the complainant's case. Order XXXVIII., r. 16, of the "Rules of the Supreme Court 1884" does not apply ; but assuming that it

does, the Court of Petty Sessions virtually disregarded it. The ordinary procedure under sec. 59 of the *Justices Act* 1890 has been followed. The summons follows Form 34, Schedule ii., which is the same as that required by sec. 7 of Act No. 1423, with the exception of an additional indorsement. Sec. 7 is not mandatory: *Coppel v. Blacklow* (a).

[HODGES, J. I do not think that decision affects the present case. It means that one of two courses may be taken—that the procedure is optional, and that the section does not direct that course.]

(Counsel was stopped.)

Schutt in reply—An affidavit sworn before a solicitor interested for the party swearing it has always been held inadmissible. The rules as to admissibility of evidence in courts of petty sessions are the same as in any other court.

[HODGES, J. There is no doubt about that. The swearing of an affidavit in this manner is irregular, but does not nullify the proceedings. Suppose no affidavit be filed and the defendant appear and defend?]

Courts of law and equity have laid down the rule that such affidavits are not to be read: *In re Hogan* (b); *Rex v. Wallace* (c); *Hopkinson v. Buckley* (d); *Ross v. Shearman* (e); *In re Gray* (f); *Tidd's Practice* (9th ed.), vol. i., 494. It is not merely an irregularity. As to the contention that this case was heard on its merits—

[HODGES, J. The affidavit was no part of the complainant's case; the justices decided outside it.]

The summons is founded upon it, and is therefore bad. If the summary procedure was abandoned, the whole proceeding was nullified. No notice of defence was given.

[HODGES, J. Both parties were present when the Court heard the case. There is no absolute rule that the affidavit is not admissible: *Vernon v. Cooke* (g). The sole effect of it is that complainant may get judgment if the other party is absent.]

(a) [1898] 23 V.L.R. 514.

(b) [1754] 3 Atk. 812.

(c) [1789] 3 T.R. 403.

(d) [1817] 8 Taunt. 74.

(e) [1847] Cowp. Rep. 172.

(f) [1852] 21 L.J. Q.B. 380.

(g) [1880] 49 L.J. C.P. 767.

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It was decided contrary to *Vernon v. Cooke* in *Ambrose v. Baker* (h).

HODGES, J. The complaint in the Court below was one in which complainant sued under sec. 7 of the *Instruments Act* 1896 (No. 1423) to recover a sum of money due upon a promissory note. It was objected by the defendant that the affidavit required by that section was sworn before the solicitor for the complainant. I think that as far as the affidavit is concerned the objection is a good one, and that such an affidavit was irregular. In this matter, however, after the objection was taken, the evidence in the case was heard. No judgment was entered upon the reading of that affidavit. Nothing was done upon the reading of that affidavit, and, so far as I can judge from the complainant's affidavit now before me, the parties then went into the case, and evidence was given, even although *defendant did not* give notice of defence. Ordinarily, the complainant, if that affidavit had been filed, and had been regular, and if no notice of defence had been given, would be entitled to sign judgment without giving evidence at all, and such judgment would have been signed on the reading of the affidavit. This does not appear to have been the course pursued here. The Court appears to have treated the affidavit in question as irregular, and as if such affidavit had not been filed, and the case was therefore dealt with in the ordinary way, and judgment was thereupon given for complainant. I do not think I should set that judgment aside. I discharge the order *nisi*, but I shall give no costs. I consider the affidavit as irregular, and it is undesirable that affidavits of any kind in a cause should be sworn before the attorney of a party to the cause, consequently there will be no costs. The motion will be dismissed without costs.

Order discharged.

Solicitors for complainant: *Moule, Hamilton & Kiddle* (for *Herring, Maryborough*).

Solicitors for defendant: *Ryan & Cunningham* (for *Nolan & Hagan, Dunolly*).

R. H. C.

(h) [1896] 2 Q.B. 372.

[PRACTICE COURT.]

ROGERSON *v.* GREAVES.1898
September 2.Hood, J.

Practice—Criminal Law—Larceny—Justices—Summary jurisdiction—Evidence—Admission of guilt—Rehearing—Crimes Act 1890 (No. 1079), ss. 69, 474.

The power given to justices by sec. 69 of the *Crimes Act* 1890 to deal summarily with certain cases of larceny may not be exercised until evidence in support of the prosecution has been called.

ORDER TO REVIEW.

George Greaves was charged upon information at the Court of Petty Sessions, Ballarat, on 25th July 1898, with larceny from the person of certain articles of the value of 15s. At the hearing the prisoner pleaded guilty and asked to be dealt with summarily. The police, however, asked for and obtained a remand. On 29th July following the case was again heard. Prisoner again pleaded guilty. The police inspector who conducted the prosecution asked the Court to deal summarily with the prisoner, under sec. 69 of the *Crimes Act* 1890. The prisoner expressed his desire to be summarily dealt with. The inspector then opened the case for the prosecution, and was about to call evidence when the presiding justice said that as the accused had pleaded guilty his solicitor would probably admit the facts stated by the inspector to be correct. The prisoner's solicitor replied that he did so admit them. No evidence was taken. The prisoner was sentenced by the justices to nine months' imprisonment.

An order *nisi* to review this decision was granted upon two grounds:—

1. That no evidence was called for the prosecution.
2. That the provisions of the *Crimes Act* 1890, sec. 69, were not complied with.

Field Barrett to move the order absolute.

Wasley to show cause—The decision in *Rattray v. Roach* (a) does not govern this case, because the omission to call evidence was merely a matter of procedure, and could be waived. I ask that the case be sent back for rehearing without costs.

(a) [1890] 16 V.L.R. 165.

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Barrett in reply—In *Reg. v. Cockshott* (b), Wright, J., sets forth the reasons why a defendant should have the option of a trial by jury put before him before he pleads guilty. In *Ruttray v. Roach* as in this case certain facts were admitted. A prisoner cannot be dealt with under sec. 69 until certain things are done, one of which is the taking of evidence against him. The *Justices Act* 1890, sec. 77, does not apply here, but only to summary proceedings. The requirements of the criminal law cannot be waived: *Park Gate Iron Co. v. Coates* (c). The conviction should be quashed.

Counsel referred to sec. 474 of the *Crimes Act* 1890.

HOOD, J. The defendant, George Greaves, was charged on information with having stolen a purse and other articles from the person of Rosina Showman. That is an indictable offence, over which the justices have, apart from sec. 69 of the *Crimes Act* 1890, no summary jurisdiction. Apart from that section it was the duty of the magistrates to hear the case, to take the evidence for the prosecution, to hear what the accused had to say in reply to it, and then to send it to trial. Sec. 69 empowers the justices to take an alternative step at the end of the case. That is, the first step is precisely the same: the justices are to hear the charge and the evidence in support of it, and what the person accused has to say in defence. But at that stage the Act permits the justices to say that if the case appears to them to be one which will be properly disposed of in a summary way, they will so dispose of it—that is, after they have taken the evidence. In the present case, before any evidence was taken the accused pleaded guilty, and the justices made a natural mistake—they assumed that they could deal summarily with him. The case was, however, remanded. On the second occasion the accused was represented by a solicitor. Again he pleaded guilty, and his solicitor admitted the facts to be as the inspector of police said they were. Again, the justices thought, naturally, that it was not necessary to take evidence about admitted facts.

I think, however, that the objection is right, and that the

(b) [1898] 1 Q.B. 582.

(c) [1870] L.R. 5 C.P. 634.

justices should have taken evidence. In addition to the wording of sec. 69, as Mr. Barrett pointed out, the reason for the procedure is shown by sec. 474 of the *Crimes Act*. According to that section, it is the duty of the justices, when they have heard a charge, to forward the depositions to the next court of general sessions for the district, there to be kept among the records of the Court, "and a copy of such conviction or of such certificate of dismissal certified by the proper officer of the Court or proved to be a true copy shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings whatever." The object of that section is that the prisoner, whether convicted or acquitted, may be able to show conclusively thereafter that he has been convicted or acquitted of this particular charge. The conviction, therefore, is wrong. But I certainly do not feel inclined to assist the defendant in any way. The proper time, undoubtedly, to take this objection was at the hearing. He had a solicitor there whose duty it was to take the objection, and who is as much presumed to know the law as the justices. If he had taken the objection then and there it could have been cured forthwith. I propose to remit the case for rehearing by the justices. There will be no costs.

Case remitted, without costs.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitor for accused: *H. S. Barrett*, Ballarat.

R. H. C.

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1893
October 10.

Hodges, J.

[IN CHAMBERS.]

PATRICK v. MUMBY.

Practice—"Rules of the Supreme Court 1884"—Order XVI., r. 46—Legal personal representative, appointment of.

Under Order XVI., r. 46, the Court has power to appoint a person representing the estate of a deceased person although such deceased person died before the commencement of the suit.

Silver v. Stein (1 Dr. 295) not followed.

THIS was an application on behalf of the plaintiffs in the action for an order that the plaintiff Louisa Rogers might be appointed to represent for all the purposes of the action the estate of Frances Rogers, a deceased daughter of Walter Patrick, the intestate, and of E. Rogers, her husband, and that one W. Patrick be appointed to represent the estate of Frances Mumby, deceased, the widow of the said intestate, and that the writ and subsequent proceedings might be amended accordingly. It appeared from the affidavits that the persons whose estates were now sought to be represented had all died before the commencement of the action. The action had proceeded to trial, when the objection was raised that the action was defective for want of parties, and the present application was accordingly made under Order XVI., r. 46.

Neighbour in support of the summons.

Guest for the defendant—The only question is whether the rule under which the application is made authorizes any such order. The persons for whose estates the representative order is asked for all died before the commencement of the action, and in the case of *Silver v. Stein* (a) it was held that a section of the English *Chancery Amendment Act* 1882, which is similar in terms to this rule, only applied to cases where the persons had been originally parties to the suit and had since died.

Neighbour in reply—A wide construction has been given to rule 46 in later cases: *Webster v. The British Empire Company* (b).

(a) [1852] 1 Dr. 295.

(b) [1880] 15 Ch. D. 169.

Counsel also referred to the following authorities:—*Crossley v. City of Glasgow Life Assurance Company* (c); *Curtius v. The Caledonian, etc., Company* (d); *Daniell's Chancery Practice* (6th ed.), p. 208.

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HODGES, J. This is an application under Order XVI., r. 46, that one Louisa Rogers be appointed in the suit to represent the estate of Frances Rogers. It is not disputed that the interest of Louisa Rogers and of Frances Rogers is identical, and that consequently so far as Frances Rogers's interest is concerned it will be thoroughly protected by the presence of Louisa Rogers. It is also asked that Walter Patrick be joined as plaintiff to represent the estate of Frances Mumby deceased, the widow of the intestate. In this case also no question is raised as to the propriety of the person selected; but it was argued that under the rule mentioned there was no power to make such an order, that the rule only applied to cases where the individual whose estate is to be represented has been a party to the suit, and has died, and then in that case it was said another person might be appointed to represent that individual. The authority for that argument is the statement made by Kindersley, V.C., in the case of *Silver v. Stein* (e), when the Vice-Chancellor was speaking of a section of an Act very similar to the rule now under consideration. He says—"As to the first part of the motion, the 44th section of the *Chancery Practice Amendment Act* does not appear to me to be intended to apply to cases where the estate to be represented is the very estate which is being administered in the suit; but only to those cases where a certain individual who, when living, was interested in the suit and was made a party, has died; and then the Court may either appoint some person to represent that party or may proceed without any representative."

If that were a correct construction of this rule I could not make this order. It is certainly giving a very narrow construction of the rule, and limiting its application to an extremely small number of cases. There is nothing as far as I can see in

(c) [1877] 4 Ch. D. 421.

(d) [1881] 19 Ch. D. 534

(e) 1 Dr., p. 296

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the language of the rule which necessarily narrows it down to the case of the death of a person who has been a party to the suit. (His Honor read the rule.) Now, if it could be said that what was there meant was that "the matter in question" must have been in question—that is, in dispute—before the person sought to be represented died, the reading of the section given by the Vice-Chancellor might be correct, but I do not think that any such limited application was meant by the rule; in the earlier part of the rule it is made as extensive as possible. The word "matter" refers to something not an action, as I understand it, and I think that the subsequent authorities show conclusively that the suggested interpretation was not the real meaning of the rule. In the last case which has been referred to, *Webster v. The British Empire Company* (f), it was held to apply to a case of a person appointed to represent the interest of an individual who had not been a party to the suit, and consequently one who had not died since the suit commenced. I think that the construction given by the Court in that case is correct, and it certainly gives a more beneficial reading of the rule, and enables cases to be disposed of with equal effect, equal certainty, less expense, and more despatch. I shall make the order as asked.

Solicitor for plaintiffs: *G. H. Neighbour.*

Solicitor for defendant: *F. M. Russell.*

W. H. M.

(f) 15 Ch. D. 169.

[IN CHAMBERS.]

THE ENGLISH, SCOTTISH AND AUSTRALIAN BANK LIMITED v.
HOBAN.1898
October 11, 19.Hodges, J.*Practice—Receiver—Service of notice of motion out of jurisdiction.*

The Court has power to grant leave to serve notice of motion for the appointment of a receiver upon the defendant out of the jurisdiction in a case where the judgment in the action had been obtained in this jurisdiction, and the defendant had been personally served with the writ within the jurisdiction, and where the property in respect of which a receivership is sought is also within the jurisdiction.

THIS was an application on behalf of the plaintiff for leave to serve notice of motion for the appointment of a receiver upon the defendant, who was out of the jurisdiction. The plaintiff, the English, Scottish and Australian Bank Limited, had brought an action against the defendant Hoban, and had obtained judgment therein in default of appearance, the defendant having been personally served within the jurisdiction. The judgment remaining unsatisfied, and the defendant being entitled to an interest under a will upon the death of a life tenant, the plaintiff desired to have a receiver appointed of this interest. The defendant had since judgment removed out of the jurisdiction, and was residing in Tasmania. The property in which the defendant had an interest was within the jurisdiction, and the plaintiff now applied for leave to serve notice of motion upon the defendant out of the jurisdiction.

W. H. Moule in support of the application—Judgment was regularly obtained within the jurisdiction, and the property sought to be affected is within the jurisdiction, and therefore the Court has power to give leave to serve the defendant out of the jurisdiction. A defendant, by merely withdrawing from the jurisdiction, cannot defeat any process of execution sought to be put in force against his property within the jurisdiction. The appointment of a receiver is a mode of execution. By Order LII., r. 8, where the defendant has been served with the writ of summons he may be served with any notice of motion, and by Order LXVII., r. 6, the Court has power to grant substituted or

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other service of a notice of motion. In *Weldon v. Gounod* (a) it was held that there was no jurisdiction to grant leave to serve a summons for the appointment of a receiver on a defendant out of the jurisdiction, but that case is distinguishable from the present, because there the defendant was a foreigner resident out of the jurisdiction when the action was brought. In this case the defendant was resident here, and was personally served with the writ of summons. It has been held that an interpleader summons may be served upon a foreigner out of the jurisdiction: *Credits Gerundeuse v. Van Weede* (b). In the case of *In re Busfield* (c) it was held that an originating summons could not be served out of the jurisdiction; but that again was the initiation of the proceedings, and is distinct from a proceeding in aid of a judgment regularly obtained within the jurisdiction. Once the Court has control of the action properly commenced within its jurisdiction it can control further proceedings in that action in aid of the judgment therein regularly obtained.

Cur. adv. vult.

HODGES, J. I have looked into the points raised in this application, and so far as it relates to the service of the notice of motion out of the jurisdiction I think I can accede to the arguments of counsel and grant the application. The judgment was regularly obtained within the jurisdiction, and the property in respect of which a receivership is asked for is also within the jurisdiction, and therefore I grant the application.

Application granted.

Solicitors for the plaintiff: *Moule, Hamilton & Kiddle.*

W. H. M.

(a) [1885] 15 Q.B.D. 622.

(b) [1884] 12 Q.B.D. 171.

(c) [1886] 32 Ch. D. 123.

[PRACTICE COURT.]

THE UNION BANK OF AUSTRALIA LIMITED v. DEAN (No. 4).

The Insolvency Act 1897 (No. 1513), s. 108, sub-s. (2)—Staying proceedings under a petition for sequestration.

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October 18.
Hodges, J.

The Court has power under sec. 108, sub-sec. (2), of the *Insolvency Act 1897* to stay proceedings under a petition pending an appeal *bonâ fide* brought in respect of the judgment which constituted the judgment debt upon which the petition for sequestration is founded.

The presentation of a petition for acceptance by the Judge is a proceeding within the above section, and an order may be made staying such acceptance even upon a notice of motion served upon the petitioning creditor prior to the presentation of the petition.

THIS was an application by way of motion made under sec. 108, sub-sec. (2), of the *Insolvency Act 1897*, made on behalf of one J. B. Dean for an order staying proceedings under an insolvency petition presented by the Union Bank of Australia Limited. The Union Bank had obtained judgment against Dean in an application under Order XIV., r. 1 (reported *ante*, p. 331). From that judgment Dean was appealing to the Full Court, and had given the requisite notices for such appeal. Execution having issued under that judgment, and a return of *nulla bona* being made by the sheriff's officer, the Union Bank proceeded to sequester the estate of the judgment debtor. From certain correspondence the solicitors of the judgment debtor became aware of the intention of the bank to present a petition, and on the 15th October 1898 served a notice of motion upon the Union Bank, asking for an order that "proceedings under the said petition, including signature of order *nisi*, be stayed pending the hearing of an appeal." The petition for sequestration was presented on the 17th October, and the motion being mentioned was by consent adjourned till the following day.

Anderson in support of the motion.

Moule to oppose—There is a preliminary objection to this application; there is no power given by sec. 108, sub-sec. (2), to the applicant to intervene at this stage. The section has been

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transcribed from the English Act without regard to the fact that the practice and procedure in England are different to the practice and procedure of this Court in insolvency proceedings. This motion was served before any petition was in existence, and, inasmuch as petitions are always presented without notice to the debtor, the section does not contemplate any intervention at this stage. There are no "proceedings" under a petition in its initial stage; the petition is merely presented, and if the Judge is satisfied that the requirements of the Act have been complied with, then he must make the order *nisi*: *In re Marie* (a). The proceedings under a petition in England are well defined. There the petition has to be served on the other side, and so many days after service it comes on for hearing. There is no machinery for giving any effect to this sub-section until the other side have been served with the order *nisi*. As soon as a notice of motion is served to stay proceedings under a petition, the creditor need not present the petition, but could wait until the motion was called on and disposed of, and then present the petition, and no motion being then in existence, the Judge has no jurisdiction to refuse to accept the petition. It is admitted that if there is jurisdiction to entertain the motion, the practice in England is to grant a stay if the appeal be made *bond fide*: *Ex parte Heyworth* (b). But security should be given in this case. This has been ordered under similar circumstances in the English courts: *Ex parte Phippen* (c).

Anderson was only called upon to argue the question as to the amount of security which should be ordered.

HODGES, J. I have intimated my opinion that I think I should grant the order, but I propose to say a few words as to the construction of sec. 108, sub-sec. (2), of the *Insolvency Act* 1897. In this case a petition is presented to me, and a notice of motion has been served upon the person presenting the petition by the person against whom it is presented. That notice of motion is dated anterior to the presentation of the petition. It

(a) [1872] 3 A.J.R. 63.

(b) [1884] 14 Q.B.D. 49.

(c) [1883] W.N. 71.

is objected that until the petition is accepted there is no proceeding that can be taken under the petition, and nothing to which this sub-section can apply. The difficulty has arisen from taking the section of an English Act without considering how far it is suited to the circumstances of this colony and the practice and procedure under our *Insolvency Act*. Although this has created a difficulty, I think I ought loyally to endeavour to give some meaning to that sub-section. If the application to the Court for an order *nisi* on a petition is not a proceeding under a petition, then there are no proceedings under a petition at all; but some proceedings are necessarily contemplated by the sub-section, and consequently I think I ought to say that the application on the petition to have an order *nisi* made sequestrating a person's estate is a proceeding, and taking it as that, I ought to hear reasons why the Court should stay proceedings under the petition. In this case, as it is a *bond fide* appeal, I think I ought to stay proceedings. However, I do not think that the defendant has very much merits, and I shall direct him to give security. I shall make an order staying proceedings upon the defendant paying 50*l.* into Court, or giving security for the same amount to the satisfaction of the prothonotary.

Motion granted.

Solicitors for petitioning creditor: *Blake & Riggall*.

Solicitor for debtor: *J. E. Dixon*.

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[IN CHAMBERS.]

MACKELLAR v. MACKELLAR AND OTHERS.

Taxation—Costs—Costs of the day—Adjournment of trial—Counsel's fees for the day—Subpoena duces tecum, resealing of.

Where a party has been allowed the costs of the day upon an adjournment of the case from one day to another day in the same sittings, he is not entitled to the fees marked on counsel's brief, or any portion thereof, as costs of the day.

Semble, the proper course would be to pay counsel for the work done on the day, and to allow the fees upon the brief to stand over until the trial of the cause.

Where a case has been adjourned from one day to another day in the same sittings, it is not necessary to reseal the subpoena *duces tecum*, and the costs of such resealing will not be allowed as part of the costs of the day ordered to be paid upon such adjournment.

THIS was a summons on behalf of the defendants for an order that the taxation of costs in the action brought by the plaintiff against the defendants be reviewed.

The following facts were stated in the affidavit filed on behalf of the defendants:—"1. The case came on for hearing before the Chief Justice on the 10th day of October, when the defendants applied for an adjournment, which was granted upon terms of their paying the costs of the day. 2. The plaintiff's solicitor brought in the plaintiff's costs of the day for taxation before the taxing officer on the 24th October. 3. The taxing officer allowed certain charges and payments to which the defendants' solicitor objected. Proper objections were lodged, and the taxation was reviewed before the taxing officer on the 26th October. 4. The taxing officer confirmed his previous ruling with regard to all the items objected to except the following:—Attending senior counsel with brief; attending junior counsel with brief; paid to Prothonotary to produce papers at trial—which items he disallowed. 5. With regard to the items 'Paid his senior counsel's fee and clerk' and 'Paid his junior counsel's fee and clerk' the taxing officer has allowed fees of 7*l.* 12*s.* and 5*l.* 10*s.* respectively for the attendance of counsel at Court upon the day when the trial was postponed. No voucher for such fees signed by counsel was produced, the only vouchers being those for the fees originally marked upon

the brief, and the taxing officer ruled that it was not necessary to produce any voucher, because, until he had decided what was a fair amount to allow for the attendance of counsel it would be impossible to pay him, and so obtain a voucher. It was not stated by the solicitor for the plaintiff that any other fees than those marked upon the brief and referred to in the affidavit of increase herein had been paid to counsel for his attendance at Court."

The solicitor for the plaintiff set out the following statements in his affidavit:—"2. In settling the costs of the day to be paid by the defendants to the plaintiff pursuant to the direction of His Honor the Chief Justice, I desired to include nothing that was not reasonable or was not properly chargeable. 3. Before drawing the bill I therefore saw the clerk to senior counsel for the plaintiff, and I asked him to let me know what amount was payable to counsel in respect of his attendance at Court and arguments in Court on the 10th October. The said clerk informed me, which I verily believe to be the fact, that on taxing the costs of the day the practice was to pay counsel the whole of his fee marked on his brief, and that the taxing officer would in his discretion allow such part thereof as he might consider to be due to counsel for his services on the day. I accordingly paid to senior counsel and junior counsel the whole of the fees marked on their respective briefs, and I produced the original vouchers therefor to the taxing officer. 4. When those items were under the consideration of the taxing officer I explained to him that I had charged the whole fee, leaving him to make the necessary allowance, which I understood was the practice. The taxing officer said that the practice was as stated by me, and I understood the defendant's representative to agree that it was so. The said taxing officer then in his discretion allowed senior counsel for the plaintiff 7*l.* 12*s.*, and to the junior counsel 5*l.* 10*s.*, being as I understand the amounts to which the taxing officer considered counsel to be entitled to as their fees of that day, payable by the defendants as costs of the day. The plaintiff and all her witnesses were in attendance on the 10th October at Court, and both counsel were in attendance and ready to conduct the case. 5. After the briefs were

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delivered to plaintiff's counsel, but a day or two prior to the 10th October, defendant's solicitor applied to me to have the case postponed in order to avoid, as they expressed it to me, their clients having to pay the costs of the day. Owing to certain circumstances it appeared to me that it would be contrary to the interests of the plaintiff to consent to such adjournment, and I told them the application must be made to the Court in the ordinary way. I am informed by the clerks of counsel that counsel expect to be paid 7*l.* 12*s.* and 5*l.* 10*s.* each for their services and attendance at Court on the 10th October."

The case was adjourned as stated in the affidavits and placed at the bottom of the month's list of cases.

Besides the fees allowed to counsel the defendants also objected to items allowing the cost of resealing the subpœna *duces tecum*.

The ground of the objections was that the taxing officer acted on a wrong principle, as the items objected to did not form part of the costs of the day.

The managing clerk for the defendant's solicitor in support of the summons—When a case is merely postponed from one day of the sittings to another day of the same sittings, the original fee marked on the brief forms no part of the costs of the day. That fee is still to be the fee for the hearing, and stands over until the trial. From the forms of bills of costs for "costs of the day" it will be seen that the original fee is never allowed when the adjournment is to a day in the same sittings, though, when the adjournment is to another sittings, a fee in the form of a "term refresher" is allowed to counsel: *Marshall, Law of Costs* (2nd ed.), pp. 585, 651; *Dax, Book of Costs*, p. 296. Refresher fees are allowed to counsel when the trial of the cause is postponed to another term: *Marshall*, p. 125; *Gordon on Costs of Actions*, p. 147.

The item charged for resealing the subpœna *duces tecum* is also wrong, because the subpœna is for the whole sittings, and there was no necessity to have it resealed.

Keep for the plaintiff to oppose—The principle as to what should be allowed for "costs of the day" is laid down in the

case of *Lydall v. Martinson* (a), where it was decided that the party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing and not merely a fixed sum for costs of the day. The party, being prepared, and having his counsel ready and instructed to proceed, should not be put to the expense of having to pay the fees of counsel when the adjournment is granted as a privilege to the other side. What fees should be allowed is a matter entirely in the discretion of the taxing officer. It is not in the nature of a refresher fee, but is something charged for work done. The practice has been to charge the fee marked on the brief, or such portion thereof as the taxing officer may allow.

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HODGES, J. In this case a trial was adjourned from one day of the sittings to another day in the same sittings. The adjournment was granted on the application of the defendants, and the Court ordered the defendants to pay the costs of the day. The plaintiff's solicitor brought in his bill in regard to these costs, and that bill has been taxed. In that bill it appears that the plaintiff, who opposed the application for the adjournment, put in a claim for the whole fee marked on counsel's briefs, and I presume paid, and the taxing officer has in his discretion allowed part of them. I regret I do not see my way to allow that to stand. I do not think that those fees, or any portion of them, were paid to counsel in respect of that day, and cannot be regarded as part of the costs of the day. I am not clear as to what would be the proper course to adopt, and probably it would be to pay counsel for the work actually done, and to allow the fees on the briefs to stand until the case came on for trial. I feel clear that the proper course was not to charge as part of the costs of the day the fees given to counsel on their briefs, or any part thereof. I think that this must go back to the taxing officer, and I regret that this must be done.

With regard to the other item, the subpoena *duces tecum*, this subpoena appears to have been resealed. It was con-

(a) [1877] 5 Ch. D. 780.

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tended that, whether it was necessary or not to reseal it, if it were resealed, that the party applying for the adjournment should pay the costs of such resealing. The costs of the day do not include every useless expenditure that a party may choose to indulge in. The costs occasioned by the case being postponed are the costs a person will necessarily incur by reason of the postponement, not any sum that such person pleases out of his munificence to pay away, and in my opinion, the case being only adjourned from one day to another of the same sittings, the officer should not have allowed the costs of resealing. It is the taxing officer's mistake, and I do not feel inclined to allow costs; if I could allow the officer's decision to stand I would certainly do so, except as to the cost of resealing the subpoena.

Summons allowed, without costs.

Solicitor for plaintiff: *Keep.*

Solicitors for defendants: *Blake & Riggall.*

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DALY v. THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED.

Trustee and c.q.t.—Settlement of mortgaged property—Settlement providing for c.q.t. occupying property—Trustee out of his own moneys paying off mortgage to save trust property—Trustee's right to indemnity—Trustee taking transfer of mortgage—Trustee ejecting c.q.t.—Transfer of Land Act 1890 (No. 1149), ss. 95 and 121—Implied covenants.

If a trustee of mortgaged land under the *Transfer of Land Act 1890* (No. 1149) has, in order to save the estate, paid off the mortgage out of his own moneys he is entitled to be indemnified out of the trust property, and to this end may take a transfer of the mortgage in the name of a nominee, and eject his *cestuis que trustent* from possession of the property, not for the purpose of personally enjoying the property, but to get out of the property the wherewithal to recoup himself the amount he has paid to save the estate; and he may do this although by the terms of the trust he is to permit them to occupy and manage the property, and has covenanted so to do.

QUESTION reserved in an action for the consideration of the Full Court by Hodges, J.

The action was brought by Florence Eleonore Daly against the Union Trustee Company of Australia Limited, the present trustee of a settlement made upon her marriage by her husband,

John Daly, her husband and her six infant children joined as defendants.

Before the marriage her husband was the proprietor under the *Transfer of Land Statute* 1864 of a piece of land at Elsternwick which was erected a dwelling-house, and on the 19th March 1881 he mortgaged the same to John Young, Alfred John Mackenzie, and Ernest James Alfred Mackenzie to secure an advance of 2400*l.*, and interest. He was also the holder of a policy of assurance on his own life for 2000*l.*, payable on his death.

Just prior to the execution of his marriage settlement he transferred the land subject to the mortgage to Gustav Beckx and William Lynch, and assigned to them his policy of assurance. He then on the 26th April executed a marriage settlement which was also executed by his proposed wife, then Florence Eleonore Beckx, and by Gustav Beckx and William Lynch as trustees of the settlement. It recited the matters aforesaid, and that the transfer of the land subject to the mortgage and the assignment of the policy to Beckx and Lynch had been made with the intent that the said land and policy should be held by them in trust for John Daly until the intended marriage, and afterwards upon the trusts and with and subject to the powers and provisions thereafter declared. It then provided that Gustav Beckx and Lynch, with the consent of Florence Eleonore Beckx, and each of them did thereby covenant and declare with and for the said William John Daly and Florence Eleonore Beckx, that they and the survivor of them and the executors or administrators of such survivor or other the trustees or trustee at any time being of those presents (thereinafter called the said trustees), should hold the land, policy, and premises in trust for Daly till the marriage, and after the solemnization of the marriage in trust to permit Daly during his life, and after his death the said Florence Eleonore Beckx during her life, to have sole possession, occupy and enjoy the said land, and to receive the rents and profits thereof and to manage the same, but so that neither he nor his wife should have power to dispose of the rents and profits of the land by way of anticipation, and after the death of the survivor of them the said W. J. Daly and his wife in trust

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for the children of the marriage as therein provided, and if all the children should die, being sons under 21 or daughters under that age without having married, in trust for W. J. Daly, his heirs and assigns for ever. And it was declared that after the death of Daly and his wife, so long as any child of the marriage should be under 21, the said trustee or trustees should receive the rents and profits of and manage the said premises, and might accept surrenders from and make allowances to and arrangements with tenants and others, and do all such other things as might to them or him seem expedient for the due management thereof, and after deducting the expenses of management, repairs, insurance, and other outgoings, and keeping down any annual sum or sums and the interest on any principal sums or sum charged on the premises should pay to the children of age their shares of the rents and pay the whole of such sum or sums as they should think proper of the shares of infants for their maintenance and education, and accumulate the residue as therein provided. And it was thereby declared that it should be lawful for the said trustee or trustees during the joint lives, and at the request in writing of William John Daly and Florence Eleonore Beckx, to exercise all or any one or more of the following powers, that is to say:—

Firstly.—A power to grant a lease or leases of the said lands and hereditaments as therein provided.

Secondly.—A power to sell or exchange the said lands and hereditaments as therein provided.

Thirdly.—A power to raise on mortgage of the hereditaments thereby settled, or any part or parts thereof, all or any moneys which might be agreed to be paid for equality of exchange or should be requisite to pay off the existing or any subsequent encumbrance on the said land or any part thereof or for any other purpose or purposes, and to secure the repayment of any moneys so raised with interest at such rate as might be thought proper by a mortgage for any term of years, or in fee simple of the hereditaments to be charged therewith, and either with or without a power of sale and with such other powers and provisions and upon such terms in all respects as might be deemed expedient.

And fourthly.—For any such purpose as aforesaid or any of the purposes of the trust to sign, execute, and perfect such instruments, assurances, and acts as the said trustee or trustees should think fit.

And it was thereby declared and agreed that the said trustee or trustees should receive all moneys which should arise from any such sale or mortgage, etc., and during the joint lives of Daly and his wife, at their request and afterwards at their own discretion, apply the principal moneys so received in or towards, *inter alia*, the discharge of any mortgages or encumbrance for the time being affecting all or any of the hereditaments subject to the trusts of those presents, with power during the joint lives of Daly and his wife, with their consent in writing, and afterwards at their discretion, to invest as therein provided. And it was thereby agreed and declared that the said policy of assurance, and the moneys to become payable thereunder, should be held upon the same terms and with and subject to the same powers and provisions as were thereinbefore expressed and declared concerning the land, or as near thereto as the nature of the property and other circumstances affecting the same would permit. And William John Daly thereby covenanted with Beckx and Lynch, their executors, administrators, and assigns, that he would duly and punctually pay the annual premiums and any other sum or sums of money, if any, necessary for keeping on foot the said original policy, with a proviso that the trustee or trustees should not be chargeable or responsible for neglecting to enforce such covenant by Daly or to keep up such policy.

The marriage was duly celebrated on 27th April 1882, and the six infant defendants were born of the marriage. The mortgage fell due on 19th March 1886, and William John Daly then executed an extension of the mortgage for a further term of five years to the Messrs. Young and Mackenzie, which was never registered. On the 31st October 1888 Messrs. Lynch and Beckx retired from the trust, and the defendant company was appointed trustee in their stead and accepted the trusts, and had since continued to be such trustee. On the 24th June 1889 William John Daly made an assignment of all his property to a

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trustee for the benefit of his creditors, and on the 6th February 1891 the plaintiff purchased her husband's interest under the marriage settlement from the trustee. On the 6th March 1891 the defendant company, without the written consent of Mr. or Mrs. Daly, gave to the Messrs. Young and Mackenzie another mortgage for five years over the land, the subject matter of the settlement. This mortgage provided that "in consideration of the sum of 2400*l.* this day owing by it under the mortgage" aforesaid to the Messrs. Young and Mackenzie, the company covenanted to pay the principal sum of 2400*l.* on the 19th March 1896, and interest at 8 per cent., reducible to 6 per cent. on punctual payment, but it provided that nothing therein was to be deemed to prejudice or affect the beforementioned mortgage or the mortgagees' rights, powers, and remedies thereunder, but all such rights, powers, and remedies might be exercised after default as though that security had not been given. This document came up for consideration by the Full Court in *Young v. Union Trustees Executors and Administrators Company Limited* (a). [The defendant in that case was the same company as the defendant in this, but had since changed its name.] The document was never registered as a mortgage.

After the marriage Mr. and Mrs. Daly resided on the premises until the year 1889, the husband duly paying the interest on the mortgage and the premiums on the policy of assurance. After 1889 neither he nor his wife paid anything to keep down interest on the mortgage or to pay the premiums on the insurance policy, but for four years the property was let by the company, with the written consent of Mr. Daly, and the whole of the rent received was retained by the company and applied by it in keeping down the interest, paying the premiums and all other outgoings. When the tenant left, the house was for some time vacant or occupied by a caretaker put in by the company, and in May of 1893 the plaintiff took possession of the property, and with her husband and their children remained in possession till their ejectment hereinafter referred to, and the company out of its own moneys kept down the interest on the

(a) [1894] 20 V.L.R. 280.

mortgage, and paid the premiums on the policies after deducting the bonuses therefrom.

On the 27th August 1895 the defendant, William John Daly, became insolvent, and had since obtained a certificate of discharge from his debts.

On the 25th January 1897 it was necessary for the defendant company to pay off the mortgage to save the estate, and without the consent of the plaintiff or her husband it paid off the mortgage and took a transfer thereof from Messrs. Young and Mackenzie in the name of its nominee, Paul Lovenorn Munster, who was the company's accountant. This transfer was duly registered.

On the 23rd April 1897 Munster, at the instance and by the command of the company, took proceedings under the *Landlord and Tenant Act* 1890, in the Court of Petty Sessions at Brighton, to eject the defendant, William John Daly, from the premises, and the Court directed a warrant to issue thereon to a constable to take and give possession of the property to the complainant Munster. Before its execution Mrs. Daly commenced the present action, alleging the above facts and other matters not material to this report, and claiming, *inter alia*—

“4. A declaration that the said company has acted in contravention of its covenant and of its trust in taking proceedings to eject the defendant Daly from the said land and an injunction restraining it and its servants and agents from further proceeding thereunder and from any proceedings to eject the plaintiff therefrom.

“7. A declaration that the plaintiff is entitled to occupy the said land and premises and an injunction against the defendant company and its servants and agents from doing any act or executing any document whereby she may be deprived of such right of occupation.”

Before the action was heard Mrs. Daly and her husband and children were ejected from the premises.

The action was tried by Hodges, J., who, after dealing with the other matters raised, found the facts material to this report as above stated, and reserved for the consideration of the Full Court the question:—

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“ Was the plaintiff under the above findings and documents entitled to a declaration in the terms of claim 4 or 7 of the statement of claim ? ”

This matter now came on to be dealt with by the Full Court [*coram* WILLIAMS, A'BECKETT, HODGES, JJ.]

Agg for the plaintiff—The marriage settlement contains no covenant by the settlor to pay the principal or the interest on the mortgage, although it does contain a covenant to pay the premiums on the life policy, because the parties all considered the house and grounds of such value that there was not the least fear of the property not producing sufficient to keep down the interest and other outgoings. Nor did anybody think that there would be the slightest difficulty about renewing the mortgage from time to time, or getting a new mortgage in its place. But even if such a covenant had been included, or ought to be implied, Daly's insolvency would put an end to it, and the trustees could have proved for their contingent liability thereunder. It is, however, submitted that the joint effect of secs. 63 and 90 of the *Transfer of Land Statute* 1864 (No. 301), now secs. 95 and 121 of the *Transfer of Land Act* 1890 (No. 1149), made the original trustees, and afterwards the company, liable to pay both principal and interest to the mortgagees; or, which in this case would be the same thing, rendered the company liable to recoup to Daly anything he had to pay for either principal or interest. As between Daly and the company the Act contemplated that the company should pay. In *Australian Deposit and Mortgage Bank v. Lord* (b), which has been generally considered by the profession to have been wrongly decided, the Court overlooked sec. 63 of the then Act (sec. 95 of the Act of 1890).

[A'BECKETT, J. In this case we have to deal with a settlement of what was left after the mortgage was satisfied. At present we have only to consider the right to occupation.]

We have to deal with a settlement of land subject to a mortgage which the company has under the Act impliedly undertaken to pay or to recoup Daly if he had to pay.

(b) [1876] 2 V.L.R. (L.) 31.

[A'BECKETT, J. The learned Judge who heard the case has found that the company paid off the mortgage in order to save the estate. Surely they then were entitled to take a transfer of the mortgage, and having done so, when you would not keep down the interest or pay the principal, had not the company a right to go into occupation and try and make the property recoup its outlay?]

Neither my client nor her husband was under any liability to the company to keep down the interest or to pay the principal. The company itself was bound to do so. It will doubtless be entitled to recoup its outlay for principal or interest out of any moneys it may receive for sale of the property, or out of the moneys eventually received on the policy of life assurance. If Daly as settlor was liable to keep down interest or to pay the principal the company can recoup itself out of his insolvent estate. The plaintiff never was liable to the company or to the mortgagees. She purchased Daly's rights, but did not make herself responsible for his liabilities. Her position is merely that of a *cestui que trust* of a property which her trustee has covenanted she shall have a right to occupy. She is and always has been willing that the place should be let, and the rents applied in keeping down interest; but the disputes between her and the company have been in relation to the question who should manage and let. She rightly claims that she is entitled to manage. The company represents the original trustees, who covenanted that she or her husband should have that right. The company should be enjoined from acting in contravention of covenants in the deed binding on them as transferees. Further, the company is trustee of a property in trust to permit the plaintiff (in the events which have happened) to occupy, and in turning her out (for the ejectment covered herself as well as her husband) the company has acted in breach of its trust.

[A'BECKETT, J. The trust is of property after the mortgage is satisfied. If a stranger were mortgagee and had acted as the company has done you would have no right to complain.]

The position of mortgagee and trustee, where the trust is such as in the present case, is entirely inconsistent, and the

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Court will not allow a trustee to occupy such a position as mortgagee : *Hamilton v. Wright* (c) ; *Tennant v. Trenchard* (d) ; *In re The Transfer of Land Act 1890, ex parte The National Trustees Executors, etc., Company* (e).

[A'BECKETT, J. How do you say the position of mortgagee and trustee is in this case inconsistent, or their interests in conflict ?]

The duty of the trustee is to allow us to manage and occupy ; the interest of the mortgagee is to prevent us doing the one or the other.

[A'BECKETT, J. The trust is of property after the mortgage is satisfied.]

The mortgagee must, for instance, account as mortgagee in possession. The only person to whom the company will have to account as mortgagee in possession is the company as trustee.

[A'BECKETT, J. I do not see why any *cestui que trust* cannot make the company account as mortgagee in possession.]

The plaintiff has no privity with the mortgagee *quod* mortgagee. The action of the company, whether it is as mortgagee or as trustee, is quite clearly in breach of the terms of its trust.

Irvine and *MacHugh* for the defendant company.

No appearance for the other defendants.

Counsel for the defendant company were not heard.

A'BECKETT, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] This is a case in which the point for our consideration has arisen under the trusts of a settlement of property in mortgage, and there was no express provision in the settlement dealing with the case which has arisen of the trustees being under the obligation to pay the mortgage to save the property. The finding of fact is that "at the date of the transfer of the mortgage" (which is mentioned) "it was necessary for the defendant trustee company

(c) [1842] 9 Cl. & F. 111 & pp. 123, (d) [1869] L.R. 4 Ch. 537.
 124. (e) [1898] 4 A.L.R. 77.

to pay off the mortgage to save the estate." Having done that, the defendant company, instead of taking a release of the mortgage, which would have extinguished the mortgage, thought it expedient to keep that mortgage on foot, and it was therefore transferred to somebody who held it for the benefit of the company. Exercising the rights of a mortgagee under this transfer—the person entitled to possession under the settlement objecting to give it up—legal proceedings were taken to get him out, and to enable the trustees who had paid the money to get the control of the property, and indemnify themselves by turning it to advantage and receiving money from it—to at all events take the first steps to indemnify themselves from the expenditure necessary in paying off the mortgage. Then the plaintiff feels aggrieved by that proceeding and brings an action, in which she seeks to have it declared that this taking of possession by the trustee company was illegal—that it was a violation of the duties which the company had undertaken as trustee.

The case reserved for the opinion of this Court is whether the declarations in terms of claim 4 or 7 of the statement of claim should be made. (His Honor read them, as above.) These claims are, of course, absolutely inconsistent with the right to be indemnified, which the trustees—not for purposes of their own, but to save the estate—have acquired by providing the means for saving the estate out of their own money. Under those circumstances their duties as trustees are suspended by reason of the right which they have to be indemnified, which is incidental to their assumption of the duties as trustees, under which a state of things has arisen which should have been contemplated at the outset—that they might have to pay to save the estate. The question is, having done that, are they to obtain repayment by using the property, or are they to make a present to the *cestuis que trustent* of the debt which they have paid, and which was on the trust property when they took it? In that aspect the extravagance of the position taken up by the plaintiff is apparent. It is a position which she clearly is not entitled to take up. The position might have been simpler supposing they merely paid the mortgage off. But actually the same thing

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would have happened. The persons paying the mortgage off would be entitled to go into the property to indemnify themselves—not to enjoy the property. They resort to other means. If those other means involve the trust estate in costs or embarrassment they might be liable to the trust estate for occasioning that. The position would be the same substantially whether they had taken a discharge of the mortgage or had done what they have done. We think, therefore, that the plaintiff is not entitled to either of the declarations which she seeks.

It has been suggested that by the position which the trustees have taken up in obtaining possession of the property through the medium of a transfer they can deal with the property without the responsibilities of a mortgagee, because they cannot enforce those obligations against themselves, but the answer to this is that if they decline to enforce the liability against themselves, there is no doubt the persons beneficially interested under the settlement could enforce it. The question is not asked as to the responsibility of the trustee for not dealing in the best way with the property as mortgagee, but whether a *cestui que trust* under the settlement has a right to assert her claims to the position as against a trustee who has a claim for indemnity out of the trust property and gives effect to it as transferee of a mortgage which he has paid off. The answer is that the plaintiff is not entitled under the findings and documents to the two declarations sought.

HODGES, J., then entered judgment for the defendant on the whole case, with costs.

Solicitor for plaintiff: *J. Woolf.*

Solicitors for defendant company: *Blake & Riggall.*

A. J. A.

PAYNE v. FINK.

Judicature Act 1883 (No. 761), s. 59—British subject residing abroad—Service of writ of summons—Writ for service within jurisdiction—Defendant temporarily in England—Attorney-under-power having power to defend actions.

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The only power to issue against and serve a writ on a British subject residing out of the jurisdiction of the Court is that given by sec 59 of the *Judicature Act 1883* (No. 761).

Under that section there is no power in the Court to order that service of a writ of summons upon the attorney-under-power of a Victorian temporarily residing in London shall be deemed service on his principal, even if his power of attorney enable him to defend actions on behalf of his principal.

APPLICATION to a Judge in Chambers for substituted service of the writ in this action on Theodore Fink, the attorney-under-power of one of the defendants, namely, Benjamin Josman Fink.

The action was brought by writ for service within the jurisdiction by John Frederick William Payne against Benjamin Josman Fink, Margaret McCracken, Coiler McCracken, and Alexander McCracken for an injunction to restrain the defendants from permitting a rain-water pipe, pipe-flue, and hopper on their premises to overhang or encroach upon the adjoining premises of the plaintiff in Elizabeth-street, Melbourne; and for damages for injury caused by the flow of water therefrom on to the plaintiff's buildings.

The affidavit in support of the application stated that the defendant Benjamin Josman Fink was the registered proprietor of the buildings in Elizabeth-street, Melbourne, known by the name of "Gresham Buildings," and the other defendants were registered proprietors of two mortgages thereon. Such buildings adjoined the Duke of Rothsay Hotel, which belonged to the plaintiff, and the hopper, rain-water pipe, 3-inch pipe-flue, and other pipes and projections in respect of which the action was brought were affixed to and upon the eastern external wall of the defendant's premises, on the north side of and abutting on the Duke of Rothsay Hotel. The defendant B. J. Fink was at the time of, and had been since the issue of the writ, out of the jurisdiction. By search of the Office of Titles it had been

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ascertained that by power of attorney dated 24th April 1897, and filed in the office, the defendant B. J. Fink appointed Mr. Theodore Fink, solicitor, of Melbourne, his true and lawful attorney for the purposes expressed, and *inter alia* the following:—
“ And I also authorize my said attorney to appear for me in any Court or Courts of Law or Equity, or other Court whatsoever, to any action, suit, bill, information, summons, or complaint that is or shall or may be brought, commenced, or prosecuted against me, or whereunto I shall be a party, and to defend the same or suffer judgment or decree to be had, given, taken, or pronounced against me in any such, action, suit, bill, information, summons, or complaint by default or otherwise as he my said attorney, shall be advised or think proper.”

Application had been made to Mr. Theodore Fink to accept service of the writ on Benjamin Josman Fink's behalf, to which he had replied that the firm of solicitors of which he was a member had received no instructions whatever in the matter, and was unable to obtain any, stating that it was a matter in which the proceedings should be served on B. J. Fink in England, and that his firm would at any time furnish the plaintiff's solicitors with his London address. Mr. Benjamin Josman Fink was a resident in Victoria, and from inquiries made it was believed that he was only temporarily absent in England.

Agg in support of the application—The nature of the damage being done is such that it is to the interest of both the plaintiff and Mr. Fink that the quickest means which the law will allow be adopted to effect service on Mr. Fink. As he has an attorney-under-power here who has power to defend actions, we have issued a writ for service within the jurisdiction, have served it on the other defendants, and now ask that an order be made that service on the attorney-under-power be deemed good service on Benjamin Josman Fink. It seems to be the rule, according to the decided cases, that such substituted service only is ordered as will in all probability reach the knowledge of a defendant, but in this case we do not want to give sufficient time for it to come to his knowledge. The Court has power to order service on an agent to be deemed service on

the principal: *Stokes, Powers of Attorney*, 27, citing *Hobhouse v. Courtney* (a), and several other cases.

[HODGES, J. Those are all before the *Judicature Act*. Is there any power in the *Judicature Rules* to do it?]

The only rule that could by any possibility be thought to be applicable is Order IX., r. 2.

[HODGES, J. I doubt whether that applies where a defendant is out of the jurisdiction.]

It has been thought not to be applicable to such a case: *Flower v. Toy* (b); *Moubray v. Riordan* (c); *London Discount and Mortgage Bank v. Daish* (d). Further, the English Courts have held that there is no power under the Rules to order substituted service where personal service cannot be effected, though it might so order if it were shown that the defendant left the jurisdiction to evade service: *Fry v. Moore* (e); *In Re Urquhart, Ex parte Urquhart* (f); *Wilding v. Bean* (g).^{*} It is not suggested that the defendant B. J. Fink left the jurisdiction to evade service. He is apparently on a trip home, and we cannot say how soon he will return. He could be served with a writ for service out of the jurisdiction, for we are offered his address in London. I submit that the *Judicature Rules* were not intended to take away any of the jurisdiction of the Court, part of which was to permit service of a writ on an agent where the principal was abroad. The service asked for is not really substituted service but personal service.

Cur. adv. vult.

HODGES, J. In this case a summons was issued by the plaintiff for service within the jurisdiction against the defendant Benjamin Josman Fink and certain other persons. At the time the writ was issued he was not within the jurisdiction, nor has he since been within the jurisdiction. Application was made to me to allow substituted service by serving a person

(a) [1841] 12 Sim. 140.

(b) [1888] 10 A.L.T. 109.

(c) [1889] 11 A.L.T. 19.

(d) [1890] 11 A.L.T. 189.

(e) [1889] 23 Q.B.D. 395.

(f) [1890] 24 Q.B.D. 723.

(g) [1891] 1 Q.B. 100.

^{*} See also *De Bernales v. New York Herald* ([1893] 2 Q.B., p. 97, n.)—ED.

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within the jurisdiction who was Mr. Fink's agent for the property, amongst other things, with reference to which the action was brought. Reliance was placed upon a certain English case, which was decided many years before the *Judicature Act*. *Hobhouse v. Courtney* (h). In that case the Court had allowed a person within the jurisdiction, and who was agent of a person out of the jurisdiction, to be served, and service upon him to be good service upon the defendant, and it was contended that that case was good law still—applicable at the present time—and that the *Judicature Act* had not altered matters of this class in any respect. The first observation I would make with regard to that is, it appears to be decided that the practice with regard to persons out of the jurisdiction has been utterly altered by the *Judicature Act*. In *Field v. Bennett* (i) the Court in its judgment says :—"The question turns upon the construction of Order LXVII., r. 6, and Order XI., rr. 1 and 6." Order XI., rr. 1 and 6, is the order dealing with service of writs out of the jurisdiction. "It was hardly contended before us that this was a case in which service of a writ or notice of a writ out of the jurisdiction would have been allowed if the application had been originally made for such service or notice. The action is for libel : the defendant is neither a British subject nor in British dominions, and service of a writ therefore upon him is forbidden by the order. The order was passed after, and in consequence of remonstrance as to the practice of the English Courts in this matter, and to bring that practice into accordance with well-settled rules of international law, or, at all events, comity. It is of no avail to consider the former practice, for the rule we are dealing with is exhaustive ; and if the case is not within the rule no service can be ordered." That is an authoritative judgment that there was a deliberate alteration of the law with regard to service on persons out of the jurisdiction.

The next observation I would make with regard to that case and the case cited is that the English law and practice upon the subject appear to me to help us very little in this matter. The right to take action against a person out of the

(h) [1841] 12 Sim. 140.

(i) [1886] 56 L.J. Q.B. 89.

jurisdiction, and the mode in which he is to be affected with knowledge of the proceedings against him, is to be determined not by the Rules, but by the Act itself. Our power is a statutory one, and not under the Rules. By sec. 59 of the *Judicature Act* of 1883, it is provided that "In case any defendant being a British subject is residing out of the jurisdiction of the Court in any place it shall be lawful for the plaintiff to issue a writ of summons in the form prescribed by any Rules of Court." That is the case here: the defendant, as I understand it, is a British subject residing out of the jurisdiction of the Court, consequently it would be lawful to serve him in the form prescribed. But it must be in one of those forms, and there is a form prescribed for service upon a person out of the jurisdiction. Then the statute goes on to provide, after enumerating matters in respect of the way the writ may issue—"It shall be lawful for the Court or Judge upon being satisfied by affidavit" of certain matters "and that the writ was personally served upon the defendant or that reasonable efforts were made to effect personal service thereof upon the defendant and that it came to his knowledge and either that the defendant wilfully neglects to appear to such writ or that he is living out of the jurisdiction of the said Court in order to defeat and delay his creditors to direct from time to time that the plaintiff shall be at liberty to proceed in the action." Those are the matters that have to come before the Court, and the Court cannot dispense with what that Act of Parliament requires, and consequently in the case of a British subject residing out of the jurisdiction the statute provides what is to be proved to the satisfaction of the Court, and provides what is to take place. Then sec. 60 provides for an action against a person residing out of the jurisdiction who is not a British subject. So that the sections taken together provide for both British subjects and others out of the jurisdiction.

It is to be noted also that our Rules, assuming that the Act dispenses with the matter, do not make any provision as the English Rules do for cases in which writs may issue and be served on persons residing out of the jurisdiction of the Court. So I take it that it is clear in this case the service is to be in

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accordance with the requirements of the statute, and I cannot look to the Rules for the purpose of dispensing with it. I refuse this application.

Solicitors: *Vail & Son.*

A. J. A.

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August 25.Hodges, J.

[IN CHAMBERS.]

IN RE GRIERSON. EDGAR v. HASLAM AND OTHERS.

Will—Construction—Intestacy—Punctuation.

A testator's will ran thus:—"I give devise and bequeath unto A. H. . . . my house and ground in the Inglewood road St. Arnaud. My furniture and effects to Mrs. A. H. The cash in bank and elsewhere after payment of my just debts funeral and testamentary expenses also a tombstone on my grave."

Held, that there was no intestacy.

Held also that the testator, by his will, intended all his property to go to the persons named in the will—to the first person named the house and ground, and the rest of the property to the other person.

ORIGINATING SUMMONS.

Application on summons by Henry Stephenson Edgar, the executor of the will of William Ralph Grierson, deceased, for the determination of certain questions affecting the distribution of the estate. The will ran as follows:—"This is the last will, etc.:—I give devise and bequeath unto Alexander Haslam farmer of St. Arnaud my house and ground in the Inglewood road St. Arnaud. My furniture and effects to Mrs. Alexander Haslam. The cash in bank and elsewhere after payment of my just debts funeral and testamentary expenses also a tombstone on my grave." The questions material to this report were:—

1. Whether William Ralph Grierson died intestate as to any and if so what portion of his estate? and, in particular, whether he died intestate as to that portion of his estate referred to in the will in the words—"The cash in bank and elsewhere after payment of my just debts funeral and testamentary expenses also a tombstone on my grave?"

3. Are Alexander Haslam and Elizabeth J. Haslam the legatees referred to in the will, or either of them, and, if so, which of them, entitled to any portion, and, if so, what portion

of testator's estate other than the land and furniture in the said will particularly mentioned and therein specifically devised and bequeathed?

The only next of kin of the testator was Philip Grierson, a nephew.

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W. Lewers for the executor.

R. Hodgson Cole for the legatees—The testator intended that the two legatees named should take all his property. The will ends with a full stop. Where the context so demands, punctuation may be disregarded by the Court: *Sanford v. Raikes* (a); *Gordon v. Gordon* (b). Where a construction leading to a testacy is possible the Court will give effect to it: *Lett v. Randall* (c). The latter portion of the will shows the direction in which the testator intended a portion of his "effects" to be expended.

Hotchin for Philip Grierson—The Court cannot rely upon conjecture as to what the testator meant: *Jarman on Wills* (5th ed.), vol. i., p. 326. The Court will not make a will for a testator: *Bishop of Cloyne v. Young* (d); *Driver v. Driver* (e). Where the Court is left in doubt it will decree an intestacy: *In re Harrison, Turner v. Hillar* (f).

HODGES, J. In this case I have not the slightest doubt from the language used by the testator that he intended to dispose of all his property. So much is clear. It is also clear that when he made the will he had in his mind two persons and only two persons to whom he desired to convey his property. That much being clear, I have then to determine whether the testator has so expressed himself as to bequeath the whole of his property to these persons. I think the language of the will is sufficient. It is certainly not so clear as it might be, but I feel fairly certain that the testator meant to give to Alexander Haslam his house and ground situate upon the Inglewood road, and to Mrs. Eliza-

(a) [1816] 1 Mer. 651.

(d) [1750] 2 Ves. 91.

(b) [1871] L.R. 5 H.L. 254, at p. 276, per Lord Westbury.

(e) [1874] 43 L.J. Ch. 279.

(c) [1839] 10 Sim. 112.

(f) [1885] 30 Ch. D. 390.

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beth Haslam his furniture and effects. The insertion of the word "also" after the words "Mrs. Alexander Haslam" would more clearly show what the testator meant. In my opinion, he meant to give his "cash in the bank and elsewhere" and his furniture and effects to one and the same person. He meant that out of the "cash in the bank and elsewhere" certain things were to be provided for : but that the "effects" exclusive of "cash in the bank and elsewhere" were specifically bequeathed. I think the will sufficiently expresses the intention of the testator that Mrs. Alexander Haslam was to have the furniture and effects together with the cash in bank and elsewhere after payment of testator's just debts, funeral and testamentary expenses.

As the will is so expressed as to justify this summons, all parties are entitled to be represented, and to have their costs taxed and paid out of the estate. The costs of the plaintiff as between solicitor and client.

Solicitor for plaintiff : *S. B. Backhouse.*

Solicitor for Alexander Haslam and Elizabeth J. Haslam
R. Mellor.

Solicitor for Philip Grierson : *H. W. Hunt.*

R. H. C.

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September 16.Hood, J.

IN RE THE ESTATE OF PHILIP PURCELL, DECEASED.

SULLIVAN v. DWYER.

Will—Construction—Misdescription—Parol evidence.

A testator by his will directed that "the land section 82 in Seymour" should be held in trust for his sister for life, remainder to her issue. He did not own, nor was there in Seymour any land being section 82, but he did own two pieces of land adjoining one another in Seymour, one of them being 82 acres, the other 31 acres.

Held, that parol evidence was admissible to show what land was intended, and, on the evidence, *held* that his sister took a life estate in the 82 acres.

ORIGINATING SUMMONS.

By his will Philip Purcell *inter alia* provided as follows :—
"I direct that the land section 82 in Seymour be held in trust for the benefit of Sarah Dwyer during her life and if she have any issue it shall revert to her issue on her death. In event of her

death without issue I direct that it be realized upon and divided equally among my sister Ann Howe my brother Timothy Purcell of Dunedin New Zealand my sister Mary Dougharty in America (or if she be dead her children) and Sarah Dwyer of Seymour." He appointed Patrick Sullivan, Michael Howe, and Edward O'Callaghan as his executors.

The executors, having proved the will, took out an originating summons against Sarah Dwyer and Timothy Purcell (on behalf of himself and all other persons entitled to the residuary real and personal estate of the said Philip Purcell, deceased), and in support of it swore an affidavit stating that neither at the time of making his will nor at any time up to his death was the testator seized or possessed of or entitled to any land being section 82 in Seymour, nor was there any section 82 in Seymour or in the parish of Seymour, but at the time of making his will and up to his death he was seized of an estate in fee simple in a block of land containing 82 acres 2 roods and 27 perches, being allotment 33, section 3, in the parish of Seymour, upon which a house was erected, and which was in the occupation of the defendant Sarah Dwyer at and long prior to the making of the will; and also in another block of land, containing 31 acres 1 rood 18 perches, being allotment 32, section 3, in the parish of Seymour, upon which no house was erected. The affidavit further stated that the will was drawn up by Dr. Boyes, one of the attesting witnesses thereto, and the instructions given by the testator in the presence of Patrick Sullivan with respect to the gift, the subject matter of the summons, were in substance and effect as follows:—
"The land that my sister, Sarah Dwyer, is living on now I leave to her in trust for life, and at her death to her issue, and if no issue to revert back to Ann Howe, Timothy Purcell, Mary Dougharty, and Sarah Dwyer."

The executors asked the opinion of the Court as to what persons were entitled to the land belonging to the testator at his death, being allotment 33, section 3, in the parish of Seymour.

The defendant Sarah Dwyer also made an affidavit stating *inter alia* that she lived in the house on allotment 33, section 3, and that allotment 32, section 3, was vacant land adjoining the

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allotment on which she lived, and that the testator had no other land in the parish of Seymour.

Hayes for the plaintiff.

Agg, for the defendant Sarah Dwyer, proceeded to read the statements abovementioned from the affidavits, when

Dawson, for the defendant Timothy Purcell, objected that no extrinsic evidence was admissible to show what land was intended to go to Sarah Dwyer. As the law requires wills to be in writing, parol evidence cannot be given to contradict, add to, or explain their contents, and the principle of the rule demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition. "No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the Judges as well of early as of later times with a cordiality and steadiness which show how entirely it coincided with their own views."—1 *Jarman on Wills* (4th ed.), 409. The rule was laid down in *Brown v. Selwin* (a) which has been repeatedly followed.

Agg—For the purpose of determining the subject matter of the testator's disposition a Court may inquire into every material fact relating to the property which is claimed as the subject of the disposition, and to the circumstances of the testator and of his family and affairs. The same is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words: *Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills* (4th ed.), pp. 11, 12. In every case the Court must put itself into the position of the testator when he made his will in order to realize what he meant by the words he uses. In this case we start with the fact that the testator had no section 82 in Seymour, nor was there a section so numbered either in Seymour or in the whole parish. What, then, did he mean when he gave "land in Seymour

(a) [1734] *Cases Temp. Talb.* 240.

82?" If parol evidence is admitted it is clear the used has reference to the acreage, not to the section. If t looked at he still gives "land in Seymour" to Sarah though he wrongly calls it "section 82." In this view ds section 82 are a *falsa demonstratio* or *descriptio*, and struck out: *Travers v. Blundell* (b). The effect of this be that Sarah Dwyer would get both allotments which ator had at Seymour. It is to be noticed that the does not say "section number 82," and it may be that " should be separated from "section" and read as refer- the acreage.

son in reply.

d, J. It is plain the testator intended to give some land Dwyer for her life by any reading of the will. Then idence is admissible to show what land he had to give. not any intention to give section 82 in Seymour, as he nor is there any land section 82 in Seymour. The will presses an intention to give land, and the evidence l shows that the land has been improperly described. t step is to construe the words used in connection with ds the testator then possessed, and see if any of those ill reasonably fit in with the description of the land e has in terms devised. I think, taking those two steps, ater becomes quite clear, and that Sarah Dwyer is to this land. The testator had no land section number he had land 82 acres in Seymour, on which Sarah was living. I think it is doing no violence to the will —"the land 82-acre section in Seymour" is to go in r Sarah Dwyer. She is entitled to the land for life. he costs of all parties to be paid out of the estate, those ecutors between solicitor and client.

itors for plaintiffs: *Gavan Duffy & King*.

itors for defendant Sarah Dwyer: *Moloney & Stuart*.

itor for defendant Timothy Purcell: *Dawson*.

A. J. A.

(b) [1877] 6 Ch. D. 436.

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[IN CHAMBERS.]

IN RE O'DRISCOL. THE NATIONAL TRUSTEES COMPANY v.
O'CONNELL AND ANOTHER.

Will—Construction—Absolute discretion—Conversion—Residue.

A testator devised and bequeathed all his real and personal estate to an executor "upon trust to sell call in and convert so much thereof as shall not consist of ready money into money at the absolute discretion of my said executor and out of the proceeds of such sale calling in and conversion and such ready money as aforesaid to pay," etc.

Held, that the words gave the executor a discretion as to the mode and time of conversion, and made a joint-stock of the proceeds of both personalty and realty, so that a subsequent direction as to the disposal of "the rest residue and remainder of my said personal estate" included the whole of the residuary estate of the testator.

ORIGINATING SUMMONS.

Patrick O'Driscoll made his will bearing date 11th November 1891, and died on the 20th July 1897. On the 17th August 1898 probate was granted to the National Trustees Executors and Agency Company of Australasia Limited. The will, so far as material to this report, ran thus:—

"This is the last will and testament of me Patrick O'Driscoll of Carlton labourer. I give devise and bequeath all my real and personal property whatsoever and wheresoever situate unto the National Trustees Executors and Agency Company of Australasia Limited which said company I hereby appoint sole executor of this my will upon trust to sell call in and convert so much thereof as shall not consist of ready money into money at the absolute discretion of my said executor and out of the proceeds of such sale calling in and conversion and such ready money as aforesaid to pay my just debts funeral and testamentary expenses and as to the rest residue and remainder of my said personal estate to pay the same to the Roman Catholic clergyman for the time being in charge of St. George's Church Drummond-street, Carlton," etc.

On the 30th August 1898 the National Trustees, Executors and Agency Company took out a summons in order that the following questions arising on the construction of the will and in the administration of the trusts might be determined:—

1. Did the testator die intestate as to the proceeds of the whole of the real estate?

2. Did the testator die intestate as to any and if so what part of the real estate?

3. What estate and interest in the proceeds of the real and personal estate does the Roman Catholic clergyman for the time being take under the will of the testator?

4. Are the next of kin of the testator entitled to share in any and what part of the estate of the testator?

5. If there is an intestacy as to the whole or any part of the proceeds of the real estate of the testator, out of what fund are the debts and pecuniary legacies to be paid?

By an order of Hodges, J., Ellen Calnan was appointed to represent the next of kin of the testator on the hearing of the summons.

Power for the plaintiff.

Weigall for the defendant O'Connell was not heard.

Meagher for Ellen Calnan—Taking the ordinary signification of the words the will does not dispose of the residue. It is not an absolute trust for conversion. The next of kin are entitled to the proceeds of the real estate.

Counsel referred to *Amphlett v. Parke* (a); *Maugham v. Mason* (b); *Wills Act* 1890, sec. 26.

HOOD, J. The substantial question in this case is whether or not the deceased died intestate as to part of his real estate. In my opinion he did not. The testator's will ran thus:—"I give devise and bequeath all my real and personal property whatsoever and wheresoever situate unto the National Trustees Executors and Agency Company of Australasia Limited . . . which said company I hereby appoint sole executor of this my will upon trust to sell call in and convert so much thereof as shall not consist of ready money into money at the absolute discretion of my said executor." These latter words

(a) [1831] 2 Russ. & My. 221.

(b) [1813] 1 Ves. & B. 410.

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mean that the executor has an absolute discretion as to the mode and time of conversion, and not that the executor may refuse to convert at all. The will then proceeds—"And out of the proceeds of such sale calling in and conversion and such ready money as aforesaid"—thus making a joint-stock of the proceeds of both personalty and realty—to pay certain legacies. Then follows a provision as to the residue:—"And as to the rest residue and remainder of my *said personal estate* to pay the same," etc. That refers to the residue of what he had before referred to, namely, the joint fund. It is true he calls it personal estate, and in one sense rightly so calls it because he is then treating it as having been converted into money. I see no difficulty about answering the questions in this case. To the first and second questions I answer—"No." To the third I answer—"The Roman Catholic clergyman take the residue of the estate." To the fourth I answer—"No." The fifth question it is unnecessary to answer. I order the plaintiff to be paid its costs as between solicitor and client out of the residue. The costs of the other parties out of the residue in the ordinary way.

Solicitors for plaintiff: *Gavan Duffy & King.*

Solicitor for defendant O'Connell: *Mornane.*

Solicitors for defendant Ellen Calnan: *Ryan & Cunningham.*

R. H. C.

[IN CHAMBERS.]

HINTZE v. HINTZE.

1898
October 4.Hodges, J.

Practice—Discovery—Security for costs—Deposit—Discretion—“Rules of Supreme Court 1884”—Order XXXI., rr. 25, 26.

Order XXXI., r. 25, gives a Judge discretion to dispense with the security for costs of discovery. This discretion will be exercised where the only property of the plaintiff is in defendant's hands as trustee thereof.

APPLICATION *ex parte* for an order for discovery, and that the security required by the “Rules of the Supreme Court 1884,” Order XXXI., r. 25, be dispensed with.

The plaintiff Gottlieb Hintze sought to set aside a deed of trust executed by him in favour of his son Gottlieb Hintze, one of the defendants. By this deed he had empowered this defendant *inter alia* to collect the rents of certain real estate in his lifetime, and after his death to sell and divide the proceeds of sale among the plaintiff's children. It was alleged by the plaintiff that the defendant had not paid him any income, and that all his property was affected by the deed of trust.

R. Kelly for the applicant.

[HODGES, J., referred to *Newman v. London and S. W. Ry. Company (a)*.]

HODGES, J. I think in this case I may make the order asked for. The case is somewhat peculiar. There is no doubt that these words in the rule, “unless otherwise ordered,” give the Court a discretion, and whereas in this case admittedly the plaintiff's property is in the defendant's hands, and defendant is receiving the rents of it, and has these rents as security for any costs which may be awarded him in the action, and inasmuch as plaintiff has shown that this property is all that he has, the Court may and ought to dispense with the usual security required by the rule.

Application granted.

Solicitor for plaintiff: *R. Kelly*.

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(a) [1890] 24 Q.B.D. 454.

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BUSWELL v. WHITE.

1898

September 28, 29.

Marriage Act 1890 (No. 1166), s. 43—Neglected Children's Act 1890 (No. 1121) s. 58—Illegitimate child—Maintenance order—Finality of decision on appeal to general sessions—Putative father proceeded against under different statute—Recognition of child by father as his—Evidence.

The fact that an order made by justices against a father for maintenance of his illegitimate child has been quashed on appeal is no bar to the making of a subsequent order by justices compelling the father to pay for the maintenance of the same child as a neglected child, provided there is evidence to satisfy the justices that he has recognized the child as his.

The question of recognition of paternity is one of fact for the justices in each case.

ORDER TO REVIEW referred to the Full Court by Madden, C.J.

The defendant White was proceeded against at the Melbourne District Court by a woman for the maintenance of an illegitimate child of which she alleged he was the father. There was no direct corroborative evidence, but letters were produced written by the defendant to the woman in an assumed name and the handwriting of these letters was sworn by experts to be that of defendant. A nurse who was called deposed that defendant was identical with a man who called at the house to make inquiries about the woman, and that on one occasion he made a remark to the effect—"This is a very unfortunate thing as I have a wife and child." On the evidence the justices made an order against the defendant. Defendant appealed to the court of general sessions against this order, and it was quashed by the presiding Judge, His Honor Judge Casey, in giving his decision saying he did not believe the girl's story. The child was then committed to the charge of the department for neglected children, and subsequently plaintiff, an officer of the neglected children's department, proceeded before justices against defendant under the provisions of sec. 58 of the *Neglected Children's Act 1890*, and obtained another order for maintenance against White, the defendant. An order to review that order was taken out on the grounds:—

1. That the justices had no jurisdiction to hear the case because the "fact" whether or not George H. White was the father of the illegitimate male child, Thomas Merrifield, was

determined in the negative by the order of the court of sessions.

That there was no evidence that the said George H. had recognized the said Thomas Merrifield within the meaning of sec. 58 of the *Neglected Children's Act* 1890.

Robert Barrett for the plaintiff to show cause—The other side rely on the case of *The Queen v. Glynne (a)*, which says that the decision of the court of quarter sessions in a case like this is final. The department are not estopped by the fact of an order being quashed. The Crown can take advantage of appeals, but is not bound by them: *The Duchess of Devon's Case*, *Smith's L.C.*, vol. ii., at p. 851.

Glendon for the defendant to move the order absolute was granted by the Court—The decision of the court of general sessions is a judgment *in rem* between the parties and binding conclusively against all the world. It is true that in the first instance before justices the mother was the plaintiff and in the second instance an officer of a department, but in all these affiliation cases the legal view is that all through the two parties are the child and the putative father. Further, I contend that on the face of the order there is no recognition of the child by the defendant intended to satisfy sec. 58 of the *Neglected Children's Act*. The condition spoken of in that section must be clear and unambiguous.

ADDEN, C.J. The recognition of the child is a matter of fact for the justices. It cannot be meant that it must be formal, but it must be clear to the recognition of a deed, where a man says "I recognize this as my act and deed."]

submit the section applies to cases where an order has been made against a putative father and he fails to maintain his child.

BECKETT, J. I do not think that is necessary. The man who recognizes the child as his is made an artificial parent for the purposes of this section, whether he be the natural one or not.

(a) [1871] L.R. 7 Q.B. 16.

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Counsel cited as authorities:—*Viner's Abridgement*, vol. x. pp. 443 and 444; *Anonymous Case in Ventris' Reports*, at p. 59 where it is stated:—"If one upon complaint to two justices ordered to keep a bastard child, and this upon appeal to session is revoked, that person is absolutely free and discharged; and unless a father can be found, the Court said that the justices of the peace must keep it themselves." *Reg v. May* (b); *Hanley v. McMasters* (c); *Rex v. Tenant* (d); *Everest and Strode on Estoppel*, pp. 76, 90; *Smith, L.C.* (9th ed.), vol. ii., 840; *Martin on Maintenance* (2nd ed.), 95.

Barrett was called on as to whether the father had recognized the paternity of the child—I submit that is a question of fact for the justices, and they have found in my favour on ample evidence. Recognition is proved by adducing facts which show that the father had admitted his fatherhood.

[PER CURIAM. We need not trouble you on that matter further, as the justices have found, as they might on the evidence before them, that the defendant did recognize the child as his.]

As to the law point on estoppel, the infant is not the real party in these proceedings. The department must proceed; it has no choice: See sec. 19 of the *Neglected Children's Act*. The recovery of money under the Act is not for the benefit of the infant but of the Crown: Secs. 52, 59. Neither is this a judgment *in rem*: *Duchess of Kingston's Case*, *Smith's L.C.*, vol. ii., p. 838.

Counsel cited *R. v. Berry* (e), followed in *Regina v. Collins* (f); *R. v. Gaunt* (g); *R. v. McCormick* (h); *Needham v. Brenner* (i); *Baxendale v. Bennett* (k); *Billington v. Cyples* (l) (as to effect of payment); *Everest and Strode on Estoppel*, pp. 8, 93.

Eagleson in reply.

- (b) [1880] 5 Q.B.D. 382.
- (c) [1889] 15 V.L.R. 322.
- (d) 2 Ld. Raym. 1423.
- (e) [1859] 28 L.J. (M.C.) 86.
- (f) [1881] 7 V.L.R. (L.) 74.

- (g) [1867] L.R. 2 Q.B. 466.
- (h) [1878] 4 V.L.R. (L.) 36.
- (i) [1886] L.R. 1 C.P. 583.
- (k) [1878] 3 Q.B.D. 525.
- (l) [1885] 52 L.T. 854.

DDEN, C.J., delivered the judgment of the Court
EN, C.J., WILLIAMS and A'BECKETT, JJ.] In this case two
are raised for our consideration. An application was
o justices by Buswell, who is an officer of the neglected
n's department, under the *Neglected Children's Act* 1890,
t White for maintenance of an infant of which he was the
parent. An order was made by the justices against
on the ground that he had recognized the child as his.
ecognition consisted of certain letters written to the
of the child under the name of Bourke. This evidence
quivocal on the face of it, and was capable of being
ed in two aspects. But the justices determined that it was
and no one else, who wrote these letters, and that
aning of the letters was recognition of the child. That
s therefore to be looked at by this Court—that White
ned an act of writing letters to the mother by which he
ized the child as his. Then it was urged that as on a
occasion the mother had sued White under the *Marriage*
and an order was made in her favour, which was quashed
eal to general sessions, that was a determination that the
was not defendant's; that the effect of it was binding on
ther as a judgment *in rem* against the whole world, and
s an estoppel between the parties. We do not think it
ssary for the Court to consider the arguments advanced
point of estoppel, because the *Neglected Children's Act*
he go-by to that question by the peculiar language of
ctment. Sec. 58 of this Act provides that parents are to
le to contribute to the maintenance of a child as justices
etermine, and the section also defines what is meant by
t." It includes "father," "mother," "stepfather," or
mother," and any person against whom an order of
on has been made as the putative father of any illegiti-
child, and also the putative father of any illegitimate child
he may have recognized as his, though no order of
on may have been made against him. Therefore the Act
says that although parent includes a natural father,
dition includes what may be termed an artificial father or
who may be assigned to a child as its parent. Therefore

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there are two classes of cases in which an artificial parent may be found—one is the case of “any person against whom an order of affiliation has been made,” and would include a case where the mother swears as to who is the father, and there is some other corroborative evidence, and an order is made against the father although there has been no recognition by him of the child as his. The other case would be one in which no order of affiliation has been made against the alleged father but he has recognized the child as his; then, even though there is no order of affiliation, the Act says the child is his. In the present case the department, through Buswell, undertook to show that White was the father of the child, because he had recognized it as his, and therefore he was the parent liable for maintenance. The justices found that certain letters and some other evidence constituted a sufficient recognition. It is said that “recognition” cannot include so slight and flimsy a form of recognition as these letters, even when accompanied by payment. It is said that this word must mean an admission by the father, unmistakable and unanswerable, that he has treated the child as his. But it has been pointed out in reply to that contention that if that were so, then, even in such a plain case as where a man had been keeping and housing children in his home for a number of years, and the department came to him and sought to make him liable, he might deny that the children were his, and it would be necessary to prove that he had made some formal recognition of them. If the view we take be correct, then “recognition” becomes a question of fact for the justices to determine in each separate case on the evidence before them. We cannot decide what evidence is necessary, nor draw the line between what is recognition in a very plain case and in a very slight case. The word is one of extremely general signification, and according to the ordinary rule of construction the ordinary meaning should be given to it in each case. In the present case there is nothing mischievous or insensible to limit the construction we put on the section, and it is not hard to see the reason why, in spite of apparent hardship, the Legislature has allowed to justices their own discretion to decide as to what is necessary to prove recognition. Accordingly we think that it

that view be taken of sec. 58 of the *Neglected Children's Act*, the question of estoppel does not arise. A different class of cases is dealt with under this Act to any other, and therefore an original decision under the *Marriage Act* does not preclude proceedings being taken against an alleged father under the *Neglected Children's Act*. The order appealed against is therefore good, and the order *nisi* will be discharged, with costs.

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WILLIAMS, J. I merely add a few words, as one piece of evidence has been omitted in the judgment of the learned Chief Justice. The justices have decided in this case that the defendant had recognized the child as his, and therefore the question is, was there evidence before them to enable them to come to that decision? I am of opinion that there was. The letters have been proved to be written by the defendant, and he made payment on behalf of the child. But then there is this additional piece of evidence: that in the interview with the nurse White said, "It is a very unfortunate thing, as I have a wife and child." I think that is evidence of weight. It seems equivalent to saying, "It is a very unfortunate thing for me," etc. I therefore concur in the judgment of the Court.

Solicitors for plaintiff: *C. J. McFarlane*.

Solicitor for defendant: *Kane*.

A. F. M.

[PRACTICE COURT.]

EMMERTON (EXECUTOR) v. SMITH AND OTHERS.

Landlord and tenant—Lease—Covenant—"Charge" upon demised premises—Sewerage—Melbourne and Metropolitan Board of Works Acts—1890 (No. 1197), Part III., ss. 114, 116; 1897 (No. 1491), ss. 5, 6.

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September 30,
November 7.
Hood, J.

Defendants were tenants of premises under a lease whereby they covenanted to "bear pay satisfy and discharge all taxes rates charges and assessments whatsoever whether municipal parliamentary parochial or otherwise imposed or to be imposed upon the said demised premises or any part thereof or upon the landlord or tenant in respect of the occupation thereof." By sec. 6 of Act No. 1491 the costs and expenses of having the premises connected with the sewerage system were, until paid, made a charge upon the property in respect of which they were incurred.

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Held, that these costs and expenses were payable by the defendants under the covenant.

Hartley v. Hudson (4 C.P.D. 367) followed.

SPECIAL CASE stated by consent under Order XXXIV., r. 1 of the "Rules of the Supreme Court 1884."

Harry Emmerton, as executor of the will of Thomas Napier deceased, issued a writ on the 18th August 1898 against Robert Murray Smith, Martin Howey Irving, Roderick Murchison William Edward Johnston, Lachlan Charles Mackinnon, and William George Lucas Spowers, claiming a declaration of the defendants' liability under a covenant in a lease of certain land and buildings, dated 15th July 1869, to pay to the plaintiff the amount which the plaintiff was liable to pay to the Melbourne and Metropolitan Board of Works for costs and expenses in respect of certain connections between the land and buildings and the sewers of the Board, and in respect of other works done by the Board. The plaintiff also claimed an order that the defendants should indemnify him against the payment or pay him the amount claimed.

By agreement the parties stated the following special case:—

"1. By an indenture of lease bearing date the 15th July 1869 and made between Thomas Napier of the one part and Edward Wilson, Lachlan Mackinnon and Allan Spowers of the other part the said Thomas Napier did for the consideration therein appearing demise and lease unto the said Edward Wilson, Lachlan Mackinnon and Allan Spowers their executors administrators and assigns certain land and premises therein described to have and to hold the said land and premises with their appurtenances unto the said Edward Wilson, Lachlan Mackinnon and Allan Spowers their executors administrators and assigns for the full term of thirty-five years to commence and be computed from the thirty-first day of March 1869 yielding and paying therefor yearly and every year during the said term unto the said Thomas Napier his heirs and assigns the rent or sum of six hundred and fifty pounds without any deduction or abatement whatsoever.

"2. By the said indenture of lease the said Edward Wilson

Lachlan Mackinnon and Allan Spowers for themselves their heirs executors administrators and assigns covenanted that they their executors administrators and assigns would from time to time during the said lease bear pay satisfy and discharge all taxes rates charges and assessments whatsoever whether municipal parliamentary parochial or otherwise imposed or to be imposed upon the said demised premises or any part thereof or upon the landlord or tenant in respect of the occupation thereof.

"3. The plaintiff is and is suing as the sole surviving executor of the said Thomas Napier who died on the 7th day of February 1881.

"4. The said lease has by various assurances and assignments become vested in the defendants who are for the purposes of this case to be deemed to be the assigns of the abovenamed Edward Wilson, Lachlan Mackinnon and Allan Spowers.

"5. The Melbourne and Metropolitan Board of Works has in pursuance of the Acts of Parliament of Victoria numbered 1197, 1351 and 1491 served a notice in the form set out in the schedule hereto.

"6. The property referred to in the notice in the last preceding paragraph mentioned is that described and included in the said Indenture of Lease.

"7. The plaintiff in pursuance of such notice submitted to the said Board a plan as required by such notice and within the time specified in such notice requested the said Board in writing to carry out the connections and other works delineated on such plan at the cost and expense of the plaintiff.

"8. The said connections and other works have been carried out by the said Board and the costs and expenses payable by the plaintiff in respect thereof amount to the sum of 225*l*. And no default by the lessor has occurred under any of the Acts numbered 1197, 1351 or 1491 and such sum has not yet been paid by the plaintiff to the said Board.

"The questions for the opinion of the Court are:—

- (a.) Whether the defendants are liable by virtue of the provisions of the said indenture of lease to pay to the plaintiff the said amount of 225*l*.

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(b.) Whether the defendants as between themselves and the plaintiff are liable by virtue of the provisions of the said indenture of lease to bear the said costs and expenses and to indemnify the plaintiff against the payment thereof.

"The parties have agreed that in the event of either of the said questions being answered in the affirmative judgment shall be entered for the plaintiff in this action for the said amount of 225*l.* with Supreme Court costs to be taxed and that in the event of neither of the said questions being answered in the affirmative judgment shall be entered for the defendants in this action with Supreme Court costs to be taxed."

Cussen for the plaintiff—The lease is a long one, and the tenant has agreed to pay charges of this kind. In *Budd v. Marshall* (a) the same words, "bear, pay, and discharge," are used as in this lease. The condition of affairs at the time the covenant was entered into must be considered.

[*Mitchell*—The presumption is in favour of the tenant.

HOOD, J. The presumption is that the tenant has not to pay anything he has not agreed to pay.]

By the *Melbourne and Metropolitan Board of Works Act* 1890, sec. 216, and sec. 6 of the Act of 1897, the cost of making these connections remains a charge upon the property until it is paid and comes within the express words of the covenant. The fact that if the landlord had performed the work it would not have become a charge does not apply, because by Act No. 1491 it has become a charge.

[HOOD, J. In that view the defendants' liability would depend upon the option of the landlord.]

Sec. 114 of the Act of 1890 does not come into operation in cases of this kind at all. This is not a case of default. *Brett v. Rogers* (b) is in point. The first part of the decision in *Hartley v. Hudson* (c) meets this case, and is good law. *Allum v. Dickinson* (d) is distinguishable. The phrase in the covenant "in respect of the occupation thereof" should be construed

(a) [1880] 5 C.P.D. 481.

(b) [1897] 1 Q.B. 525.

(c) [1879] 4 C.P.D. 367.

(d) [1882] 9 Q.B.D. 632.

liberally. It is the intention of the parties to the lease that the tenant should pay all charges imposed upon the premises whether in respect of the landlord or the tenant.

Counsel referred to *Rawlins v. Briggs* (e); *Wilkinson v. Collyer* (f).

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Mitchell and *Weigall* for the defendants—The payment in this case is not anything “imposed on the landlord or tenant in respect of the occupation thereof.” Unless the tenant has, by express words, made himself liable in respect of this payment, he is not to be held liable. *Allum v. Dickinson* shows that as a rule a tenant will not be made liable for payments which permanently improve the capital value of the property, unless there is an express undertaking by him to become liable. If there is any ambiguity in the expression used it should be construed in his favour. These are not “taxes, rates, charges or assessments imposed, etc.” There is no “charge.” The duty is imposed on the owner either of doing the work himself, in which case there never will be a charge in respect of the premises, or of asking the Board to do it. But that is not a charge upon the premises. The latter part of the decision in *Hartley v. Hudson* is merely a dictum. That case is distinguishable. The words in that case are “charged on the premises.” In this case there is a duty imposed on the landlord, and, as incidental to the sum which the Board pays, there is a charge given on the premises. The charge itself is not imposed by the Act on the premises. Counsel referred to *Foa on Landlord and Tenant* (2nd ed.), p. 151. The duty on the landlord here is, apparently, either to do the work himself or to ask the Board to do it. The Act provides that, although his duty may be merely to give notice to the Board to do the work, the primary liability is on him. The Board is given a charge over the premises in respect of the sum which he is liable to pay them, until it is paid: Sec. 6 (8) of Act 1491. Counsel referred to *Brett v. Rogers* (*supra*), at p. 529. If the rate is payable by the owner or occupier, that, under certain circumstances, would be something imposed on the premises. If made “in respect of” the premises, that would

(e) [1878] 3 C.P.D. 368.

(f) [1884] 13 Q.B.D. 1.

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make a great difference: *Aldridge v. Ferne* (g); *Tidswell v. Whitworth* (h). The word "charges" should be read as *ejusdem generis* with the words connected with it. It would be extraordinary if the defendants' liability were made to depend on the way in which the landlord chooses to exercise his option.

[HOOD, J. I am inclined to agree with your view, but how do you distinguish *Hartley v. Hudson* ?]

That is not a binding authority, and the Acts here are not the same as that which governed that case. Moreover, in *Hartley v. Hudson* the words in the covenant are "which now are or may be charged." Here the words are "imposed or charged."

Cussen in reply—In *Foa on Landlord and Tenant* (2nd ed.), p. 153, *Hartley v. Hudson* is referred to without disapproval. The argument in *Tidswell v. Whitworth* was that the word "imposed" had a wider meaning than "charged."

Counsel referred to *Thompson v. Lapworth* (i).

Cur. adv. vult.

November 7.

HOOD, J., read the following judgment:—This is a special case stated by consent for the determination of this Court. The dispute arises out of a lease, whereby the defendants covenanted with the plaintiff's testator to "bear pay satisfy and discharge all taxes rates charges and assessments whatsoever whether municipal parliamentary parochial or otherwise imposed or to be imposed upon the said demised premises or any part thereof or upon the landlord or tenant in respect of the occupation thereof." During the currency of the lease the Melbourne and Metropolitan Board of Works, acting under legislative sanction, gave the plaintiff a notice, with the object of having the demised premises connected with the sewerage system. The plaintiff, as he was entitled to do, submitted a plan for carrying out the connection, and requested the Board to do the work at his expense. The Board has done the work, and, by sec. 6 of Act

(g) [1886] 17 Q.B.D. 212.

(h) [1867] L.R. 2 C.P. 326.

(i) [1868] L.R. 3 C.P. 149.

No. 1491, the costs and expenses thereof are made a charge upon the property until paid. The plaintiff now contends that the provisions of this section bring the matter within the covenant.

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It was admitted that this point is covered by authority. In the case of *Hartley v. Hudson* (*k*), Lindley, J., held on similar legislation and a similar covenant that the tenant was bound to pay. Although two reasons are given for the judgment, one only of them applies to the present case. It was urged for the defendants here that, while the decision might be correct, yet this particular reason was erroneous. But I find that the case has been referred to without the slightest sign of disapproval on any ground in the latest text-books, and also in *Budd v. Marshall* (*l*); *Allum v. Dickinson* (*m*); and *Wilkinson v. Collyer* (*n*). Covenants of this nature have been interpreted by the Courts in a very wide sense, and the only distinction suggested in the present case is that the landlord was not in default because the money became due by him under agreement. But until payment the expenses incurred are to be a charge on the premises, and are a debt incurred by the landlord in respect thereof: See *Rawlins v. Briggs* (*o*). I cannot, therefore, see any ground for not following the English decision, and so I answer the second question in the affirmative, and direct judgment to be entered for the plaintiff for 225*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *J. M. Smith & Emmerton.*

Solicitors for defendants: *Blake & Riggall.*

R. H. C.

(*k*) 4 C.P.D. 367.

(*m*) 9 Q.B.D. 632.

(*l*) 5 C.P.D. 481.

(*n*) 13 Q.B.D. 1.

(*o*) 3 C.P.D. 368.

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HESLOP v. PHILLIPS.

September 29, 30,

November 21, 25. *Promissory note—Contemporaneous oral agreement—Inconsistency—Inadmissibility of evidence—Costs.*Hood, J.

In an action by the indorsee of a promissory note against the indorser, evidence will not be permitted of a contemporaneous oral agreement between the parties whereby the defendant agreed to indorse the note in plaintiff's favour and the plaintiff agreed not to enforce the defendant's liability upon the note unless and until another fund had been exhausted, and then only for the balance unpaid, such an agreement being inconsistent with the terms of the written contract. Breach by the plaintiff of an oral agreement of this kind does not form ground for a cross action.

Heseltine v. Simmons ([1892] 2 Q. B. 547) discussed and distinguished.

POINT RESERVED at the trial of the action.

The facts and arguments may be sufficiently collected from the judgment.

F. Gavan Duffy and *J. C. Anderson* for the plaintiff.

Counsel referred to *Leake on Contracts* (1st ed.), p. 188; *Erskine v. Adeane* (a); *Abrey v. Crux* (b); *Hoare v. Graham* (c); *Cornish v. Bank of New South Wales* (d); *Foster v. Jolly* (e); *Adams v. Wordley* (f).

Isaac A. Isaacs (A.G.) and *Schutt* for the defendant.

Counsel referred to *Bank of Australasia v. Ehrenfried* (g); *Chalmers on Bills of Exchange* (5th ed.), p. 59; *Lindley v. Lucy* (h); *Byles on Bills* (10th ed.), p. 177; *Bank of South Australia v. Williams* (i); *New London Credit Syndicate v. Neale* (k); *Heseltine v. Simmons* (l); *Clough v. Rowe* (m); *Morgan v. Griffiths* (n); *Jervis v. Berridge* (o); *Thompson v. Chubley* (p).

Duffy, in reply, referred to *Wallace v. Littel* (q); *Mercantile*

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| (a) [1873] L.R. 8 Ch. 756. | (i) [1893] 19 V.L.R. 514. |
| (b) [1869] L.R. 5 C.P. 37. | (k) [1898] 2 Q.B. 487. |
| (c) [1811] 3 Camp. 56. | (l) [1892] 2 Q.B. 547. |
| (d) [1864] Macassey's Rep. 181 N.Z. | (m) [1888] 14 V.L.R. 70. |
| (e) [1835] 1 C.M. & R. 703. | (n) [1871] L.R. 6 Ex. 70. |
| (f) [1836] 1 M. & W. 374. | (o) [1873] L.R. 8 Ch. 351. |
| (g) [1866] Macassey's Rep. 439 N.Z. | (p) [1836] 1 M. & W. 212. |
| (h) [1864] 34 L.J.C.P. 7. | (q) [1861] 11 C.B. N.S. 369. |

Agency Co. Ltd. v. Fletwick Chalybeate Co. Ltd. (r); Abbott v. Commercial Bank of Australia (s).

Cur. adv. vult.

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HOOD, J., read the following judgment :—This was an action on a promissory note by indorsee against indorser. The defendant, in addition to a defence, put in a counterclaim, which alleged that, prior to the 14th February 1898, one Guest had assigned his estate for the benefit of his creditors, and that about that date it was verbally agreed between the plaintiff and the defendant that if the defendant would indorse a promissory note for £200 in favour of the plaintiff, to be made by Guest, the plaintiff would purchase a portion of Guest's estate, and, before enforcing any liability against the defendant, would sell such estate, and would only enforce the liability of the defendant, on the said promissory note, for any deficiency between the amount owing by Guest and the amount realized from such estate. This agreement was, at the trial, substantially proved, and it was also proved that the plaintiff had acted in breach of it, and judgment was entered for the defendant for 1s., without costs, subject to the objection that the defendant was attempting to vary a written contract by parol, and with that objection I have now to deal.

The counterclaim admits the existence and indorsement of the promissory note and makes no attempt to show that the document was merely meant as a guarantee. The liability of the defendant upon the note is thus recognized, but a verbal agreement is set up, which it is contended is collateral to the written contract and not inconsistent with it. If this be so the defendant is entitled to succeed. It is no answer to an action upon a parol agreement to say that the parties made a contemporaneous written contract respecting the same subject matter providing that the two agreements are collateral and are not in conflict. Parol evidence, too, is always admissible to establish a condition upon which the existence of a contract depends, and to show that what purports to be the written contract is not so in reality. But when once it is clear that a document contains the terms of

(r) [1897] 14 *Times* L. R. 90.

(s) [1879] 5 V. L. R. (L.) 366, at p. 372.

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the arrangement between the parties that writing is paramount. Except in certain cases of mistake or fraud the written agreement cannot be added to, varied, or contradicted by verbal testimony. The whole point therefore here is, does the verbal agreement relied upon by the defendant contradict the terms of the promissory note, and in my opinion it does. By his indorsement the defendant engaged that on dishonour he would compensate the holder provided the requisite notices were given (*Instruments Act*, sec. 56 (2)). It must be assumed for the argument that the defendant received due notice of dishonour and so as Guest did not pay the 200*l.* the defendant was bound by his written contract to do so. But the agreement which the defendant proved attaches a condition to the performance of that written contract which otherwise would not exist. The verbal arrangement leads to a totally different result from that contemplated by the promissory note. The latter provides for the defendant paying a sum certain upon the happening of defined events, while according to the former the defendant might have to pay any sum from 200*l.* down to nothing. Such an agreement is of necessity opposed to the written contract, and would afford no answer to an action brought upon the promissory note: *Abrey v. Cruix (t)*; *New London Credit Syndicate v. Neale (u)*. It has been, however, strenuously contended that while there might be no defence yet there would be ground for cross action. But the same reason seems to me to apply to a cross action as applies to a defence. In each instance the verbal agreement is set up in opposition to the writing. In the cross action the defendant's real complaint is that he has been compelled to pay the full amount of the promissory note. But that is the very thing which by the writing he undertook to do, and I cannot think that any action for damages can be maintained in such circumstances (see *Cornish v. Bank of New South Wales (v)*), whatever other relief the defendant might perhaps be entitled to. With regard to the case of *Heseltine v. Simmons (w)*, which was relied upon in support of the defendant's view, distinctions were

(t) L.R. 5 C.P. 37.

(u) [1898] 2 Q.B. 487.

(v) [1864] Macassey's Rep. 181 N.Z.

(w) [1892] 2 Q.B. 547.

suggested by counsel on each side between it and *Abrey v. Cruix*. It seems to be suggested in that case (at p. 554) that it is an answer to an action on a covenant to pay money in instalments to show that a substantial part of the bargain between the parties at the time was a complete understanding that the document should not be available against the covenantor until certain other documents were realized upon. I would gladly have followed this view, but it seems to me opposed to the principle of *Abrey v. Cruix*, and I am unable to appreciate the distinctions drawn by counsel. Owing to this decision I would have referred the matter to the Full Court had I not been informed that the judgment in this action on the other portion of the case was under appeal. Under these circumstances it is better for the parties for me to decide this point and let the whole matter be dealt with in the one appeal.

Upon the question of costs I have felt great difficulty and hesitation. The good wholesome rule is that the loser pays. But the merits, in my opinion, are entirely with the defendant, and the plaintiff only succeeds by virtue of a rigid rule of law. I was impressed with the contention that I should not regard the merits, as I ought to have rejected the evidence, and then I would have been in ignorance of the merits. But I have heard the evidence, and have formed a very decided opinion on the merits. Then it was urged that the defendant only amended his counterclaim at the last moment, and must have failed on it, on the facts, as it originally stood. This is so; but the plaintiff never raised this particular objection in his reply, trusting to defeat the defendant on the merits, so that both parties were at fault in the pleadings. The plaintiff is right in his legal objection, and if this were all I would probably have given him the costs. But regarding the nature of the judgment against him, by which he was not much hurt, and that this application is almost avowedly made to get costs, I think I ought not to encourage litigation which has such an object in view; and in addition the plaintiff appeared in such an unfavourable light in connection with the other matters in the case that he deserves no consideration. I will therefore allow

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this motion without costs, and enter judgment for the plaintiff on the counterclaim without costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Crisp, Lewis & Hedderwick.*

Solicitors for defendant: *Tolhurst & Druce.*

R. H. C.

F.C.

IN RE FORBES AND THE MARINE BOARD OF VICTORIA.

1898
 September 15, 26,
 November 16.

Marine Act 1890 (No. 1165), s. 183 (2)—Master—Misconduct—Gross act of misconduct.

The Court of Marine Inquiry, upon investigation of a charge against a master of a steamship of misconduct under sec. 183 (2) of the *Marine Act 1890*, has power to order his certificate to be suspended unless it finds him guilty of a gross act of misconduct, and this should be specified in the finding of the Court.

Order of MADDEN, C.J. (*ante*, p. 124), affirmed.

APPEAL by way of motion from an order of Madden, C.J. (reported *ante*, p. 124).

A rule *nisi* was obtained calling upon the Marine Board of Victoria, the Court of Marine Inquiry, and J. A. Panton, P.M. W. F. A. H. Russell, and George Bevis, members of the Court, to show cause why a writ of prohibition should not issue prohibiting them from enforcing the suspension of the certificate of competency as a master of William Chalmers Forbes, and from enforcing or in any way acting upon the decision, judgment, or order suspending such certificate and ordering him to pay the costs of the proceedings made by the Court of Marine Inquiry or, alternatively, why a writ of *certiorari* should not issue to bring up to be quashed the decision, judgment, or order, and all proceedings therewith, upon certain grounds. On 17th June 1898 Madden, C.J., made absolute the rule upon several grounds, one of which (the 7th) was "that the Court did not find William Chalmers Forbes guilty of an offence under the *Marine Act 1890* justifying a suspension of his certificate." The charge against Forbes was one of misconduct in that as master of the steamship *Edina* he did "carelessly navigate the said steamship on the 27th April 1898, whereby and as the result of such careles

navigation the said steamship came into collision with and did sink the steamship *Manawatu*," &c. The judgment of the Court of Marine Inquiry recited the charge, and stated that the charge of misconduct preferred had been sustained, and that such misconduct amounted to gross misconduct, and that therefore it suspended his certificate of competency as a master for twelve months. The further facts may be collected from the previous report.

The Marine Board, the Court of Marine Inquiry, and the members of the Court now appealed by way of motion from the order of Madden, C.J.

Mitchell for the appellants to move—The Marine Board has power not only to prefer a charge but charges of misconduct against more than one person. The Court of Marine Inquiry is got together under sec. 185 of the *Marine Act* 1890. The finding of gross misconduct is a finding of a gross act of misconduct.

Counsel referred to *In re Bell* (a), and to *Ex parte Taylor* (b).

Cussen for Forbes to oppose—Where a special statute creates a new offence the Court has first to find the accused guilty in the very words of the Act. Unless Forbes is found guilty of a gross act of misconduct the Court of Marine Inquiry has no power to suspend his certificate.

[HODGES, J. The introduction of the word "act" in sec. 183 (2) is suggestive.]

It points to a positive act. The act must be construed strictly in favour of Forbes: *Reg. v. Stroulger* (c). The attention of Hood, J., in *In re Bell* was not directed to the form of the finding.

Mitchell in reply.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of the Court (Williams, Hodges, and Hood, JJ.):—This is a motion made to the Court

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(a) [1892] 18 V.L.R. 55, 432.

(b) [1889] 15 V.L.R. 287.

(c) [1886] 17 Q.B.D. 327.

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asking that the order of 17th June 1898 be reversed, and that a rule *nisi* issued for a writ of *certiorari* should be discharged. The rule *nisi* was obtained from Madden, C.J., apparently upon eight grounds, some of which are merely repetitions of the same ground, and the learned Chief Justice went *seriatim* through these objections. We do not think it necessary to consider, and we do not express any opinion upon, any of these objections except one. We confine our judgment to that one (the 7th) objection, and we must not be understood to assent to the validity or otherwise of the other grounds of objection stated in the order *nisi* for prohibition. That seventh objection is: that the said Court did not find the said W. Chalmers Forbes guilty of an offence under the *Marine Act* 1890 justifying the suspension of his certificate. The Chief Justice held that that objection, amongst others, was a good one, and in effect he says that the finding of the Board was too general and too vague in its terms. Without coinciding with all the reasons and illustrations mentioned in his judgment in dealing with that objection, we think his decision upon that objection right.

The matter turns upon the meaning and construction of sec. 183 of the *Marine Act* 1890, by which the Court of Marine Inquiry is authorized to make inquiry into misconduct on the part of certificated masters of ships. That section provides that—"When any such investigation is directed by the Board to be held into the alleged incompetency or misconduct of any master mate or engineer holding a certificate whether of competency or service the said Court of Marine Inquiry shall hold the same and may determine that any such certificate held by a master mate or engineer should be cancelled or suspended if such master mate or engineer upon any such investigation shall—"

[And then it creates three classes of offences, as they may be termed, and provides that in the event of any such master being found guilty of offences (a), (b), and (c), his certificate may be suspended.]

"(a.) Be found guilty of any gross act of misconduct drunkenness or tyranny.

"(b.) Be found to be incompetent.

"(c.) Be found to have occasioned by his wrongful act or default the loss abandonment of or serious damage to any ship or loss of life."

Now, in this case the Court has purported to find Forbes guilty of an offence under class (a). The exhibit which contains their finding is exhibit G, and, omitting formal parts, it states that the Court, having carefully inquired into the circumstances of the above charge, finds that the charge of misconduct preferred against the said William Chalmers Forbes has been sustained, and that such misconduct amounts to gross misconduct.

Now, we think that that finding of the Board is too indefinite and vague, and also too general, not only upon the wording, and having regard to the terms of the portion of sec. 183 to which I have alluded, but also upon general principles. That part of the section designated by the letter (a) provides—"if he be found guilty of any gross act of misconduct." What the Court found him guilty of was of misconduct amounting to gross misconduct. What the Act says is that it has to find him guilty of a gross act of misconduct. It has not done so. Upon that ground the finding is bad. It ought to have gone further.

The charge against the master was general in its terms. He was charged with misconduct. That charge may be sufficient. But when the Court comes to its finding and finds him guilty it must find him guilty of a specific act of gross misconduct. And we think that it ought to have gone further: not only ought it to find him guilty of a gross act of misconduct, but it should have proceeded to specify the gross act of misconduct of which it found him guilty.

Leaving the Act and adverting to general principles, it is a principle well established that a man charged with an offence should know the nature of the offence of which he is found guilty, and from the vague and indefinite nature of this finding it is impossible even for this Court to ascertain from the finding of the Court of Marine Inquiry of what act of gross misconduct he has been found guilty.

The records of the Court should always show the specific

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offence of which a man has been found guilty, and in respect which his certificate has been suspended.

Upon that ground we sustain the finding of the Chief Justice and dismiss the motion, with costs.

Motion dismissed.

Solicitor for William Chalmers Forbes : *Croker*.

Solicitor for the Marine Board, etc. : *Guinness, Crown Solicitor.*

R. H. C.

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November 24.

Hood, J.

[IN CHAMBERS.]

PEARCE v. TOWER MANUFACTURING AND NOVELTY COMPANY

Practice—Writ—Service upon company—Commercial traveller—Foreign company—“Carrying on business”—“Rules of Supreme Court 1884”—Order IX., r. 1—Companies Act 1896 (No. 1482), s. 70 (3).

A foreign company is not carrying on its business in Victoria by reason of the fact that it employs a commercial traveller resident in Victoria to receive orders on commission and to transmit them to its office abroad.

SUMMONS IN CHAMBERS.

Lydia Pearce, trading as the Kalizoic Company, entered into an agreement in November 1897 with William Lewis, as agent for the Tower Manufacturing and Novelty Company, a foreign company carrying on business in the United States of America for the purchase of certain goods by sample from the latter company. The goods were paid for by draft. The goods were delivered after the draft was met; but some of them were alleged to be not in accordance with the sample. After some negotiation Pearce issued a writ against the Tower Company claiming damages in respect of the alleged breach of contract and served it upon one Charles Bott, at No. 284 Post-Office place, Melbourne, upon premises having the name of the defendant company inscribed outside upon a brass plate. Upon an application on motion for that purpose by the defendant company, Hood, J., set aside the service of the writ upon the ground that the affidavits filed on behalf of the defendant showed that Bott was not an agent of the company for the acceptance

of service, but was the servant of William Lewis, the agent of the company, who resided in New South Wales. On a subsequent date Hood, J., made an order *ex parte* that substituted service should be effected upon the defendant company by serving Bott and Lewis. The defendant company now applied on summons to set aside the order for substituted service.

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W. H. Williams for the defendant company.

J. E. Mackey to oppose.

During argument reference was made to—*Newby v. Von Oppen* (a); *Huggin v. Comptoir d'Escompte de Paris* (b); *The Companies Act 1896* (No. 1482), sec. 70 (3); *Rules of Supreme Court 1884*, Order IX., r. 8; *Grainger & Son v. Gough* (c).

HOOD, J. The defendant company is a manufacturing company, registered in New York, where it carries on its business, and it has an agent in Sydney, one Lewis, whose power of attorney is somewhat limited, but whose business is to sell the goods of the company to any person in these colonies. There was no statement as to how Lewis was to be paid, but I draw the conclusion that he was to be paid by commission. Lewis employed a person named Bott to obtain orders for the company's goods from people in Melbourne. Lewis himself was in the habit of visiting Melbourne two or three times a year, and when his business here was done he transmitted the orders he had obtained to the company in New York, where they were fulfilled by the goods being sent to Lewis, who did not hand them over until a draft for them had been accepted or the goods had been otherwise paid for. The company, either through Lewis or through Bott—it is not clear which of them, Lewis, I think—made a contract with the plaintiff Pearce for the sale of certain goods. Pearce, being dissatisfied with the performance of it by the company, issued a writ against the latter

(a) [1872] L.R. 7 Q.B. 293.

(b) [1889] 23 Q.B.D. 519.

(c) [1896] A.C. 325.

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for breach of contract. In the first instance the writ was served on Bott. I set aside this service upon the ground that there was in the affidavits filed on the company's behalf an uncontradicted statement by Lewis that Bott was his clerk and was not connected with the company. The plaintiff then obtained an *ex parte* order for substituted service of the writ upon the company by serving it upon Lewis and Bott, upon the ground that the company was carrying on business here, and that one of them was its manager or chief officer. This application is now made to set aside the order for substituted service on the ground that the company was not carrying on business here. I think the point raised by the company a shabby and contemptible one, and if it succeeds it will leave the plaintiff practically without remedy. At first I felt disposed to dismiss this summons and compel the plaintiff to appeal against my decision, in order that full publicity might be given to the matter. But from the affidavits filed and read before me I think full publicity will be given to the matter, as the company's customers will now see that they are compelled, if they desire to sue the company, to travel to New York in order to do so. I therefore decide the case for myself. The company does not, as a matter of fact, carry on its business here. The mere fact that a commercial traveller is employed by it for the taking of orders here is not sufficient. It would never do to hold that the employment of a commercial traveller meant the carrying on of business so as to make service on that traveller a sufficient service. I arrive at this conclusion with great regret. I shall allow the application, but without costs. I hope, if the plaintiff can find no other remedy, that she will be able to appeal and upset this decision.

Summons allowed ; service set aside.

Solicitors for the plaintiffs: *Fox & Overend.*

Solicitor for the defendant: *H. W. C. Simpson.*

R. H. C.

[IN CHAMBERS.]

THE UNION BANK OF AUSTRALIA LIMITED *v.* LAMBELL.*Practice—Evidence—Company—Corporation—“Rules of Supreme Court 1884”—
Order XIV., r. 1.*1898
October 31.
Hodges, J.

A foreign corporation carrying on business in this country must, when applying for final judgment under Order XIV., prove the fact of its incorporation, such fact being a material allegation of the statement of claim.

SUMMONS under “Rules of Supreme Court 1884,” Order XIV.

The Union Bank of Australia Limited applied on summons under Order XIV. for final judgment upon a writ specially indorsed. The indorsement upon the writ stated that the action was by a limited company, but the affidavit in support of the summons contained no verification of that statement.

Mitchell in support was stopped after opening the facts.

A. H. Davis to oppose—The affidavit in support of the application should show that the plaintiff is incorporated. In *Commercial Bank v. Hatton* (a) the converse occurred; in that case there was no allegation in the indorsement, but the affidavit in support stated that the plaintiff company was incorporated.

Mitchell in reply—From the affidavit it appears that the plaintiff is a banking company carrying on business in Victoria. The allegation is not essential.

HODGES, J. It is necessary for a plaintiff who seeks final judgment upon a specially indorsed writ to show his right to succeed, and he must therefore prove every fact which he would have to prove at the trial, and for this purpose he must assume that everything is put in issue by the defendant. Speaking rather of the time when I was at the bar, my recollection is that my colleagues on the bench have decided that all the material allegations of the statement of claim must be proved. The defendant, however, has no merits. I shall therefore dismiss the summons without costs, the plaintiff to have liberty to make a fresh application for final judgment.

Summons dismissed.

Solicitors for plaintiff: *Blake & Riggall.*

Solicitor for defendant: *Keep.*

R. H. C.

(a) [1895] 21 V.L.R. 489.

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October 28.
Hodges, J.

[PRACTICE COURT.]

VIOLET TOWN, SHIRE OF, ETC. v. TWAMLEY.

Local Government—Rates and Rating—Justices Act 1890 (No. 1105), s. 8
Particulars of claim, sufficiency of—Local Government Act 1890 (No. 11
—Rates, claim for—Particulars of rate.

In a complaint for the recovery of municipal rates the particulars annexed to the summons should state the date in respect of which the rate has been made.

ORDER *nisi* to review.

The President, etc., of the Shire of Violet Town sued the defendant, Richard Twamley, in the Court of Petty Sessions in respect of rates, and the defendant was ordered to pay the same. An order *nisi* was granted to review the decision. The particulars annexed to the summons were as follows:—"Particulars within referred to: For amount of general rate made due and payable on the 8th February 1897, in respect of property No. 274—1l. 8s. 0d." The facts set out in the affidavits showed that the objection was raised to the sufficiency of the particulars, being pointed out that with such particulars it was impossible for the defendant, who had been during some of the time a occupier of the land, but who had gone out of occupation, to ascertain whether he was liable for any portion of the rate or not. The rate collector stated in his evidence that the municipal year for which the defendant was sued ran from 30th September 1896 to 30th September 1897; that he did not go to the land to see who was in occupation, but merely took the previous rate. The demand was addressed to the defendant at Baddaginnin where the property rated was situate. It was proved for the defence that the defendant had moved to another place during the year in respect of which the rate was made; that he never received the notice of demand. The chairman of the bench said it was a hard case for the defendant, but that he was liable, as he had been in occupation up to the 15th January 1897. The defendant's solicitor then asked the Court to apportion the rate as the defendant was only liable for the time he had been in occupation. The Court refused to apportion the rate, and gave judgment for the whole rate. The defendant then obtained

der *nisi* to review such decision, on the following
s:—

That the particulars annexed to the summons were not
t to satisfy sec. 81 of the *Justices Act* 1890.

That the Court of Petty Sessions should have apportioned
unt payable by the defendant in accordance with sec. 292
Local Government Act 1890.

That no demand had been made upon the defendant for
unt sought to be recovered.

Tough to show cause—The particulars are sufficient within
ning of sec. 81 of the *Justices Act* 1890. The date and
ppear, and the evidence given at the hearing supplied
ufficiency if it ever existed. That section provides that
ssion shall vitiate the particulars if in the opinion of the
such omission is not likely to mislead. The Court can
o the evidence—*McLean v. Morley (a)*—and such evidence
supplied during the hearing. The rate might well be a
rate, and no date need be given for the period it is
d to cover. The justices had a discretion to say whether
rticulars were sufficient: *Springfield Road Board v.*
(b). The form given in the 17th schedule to the *Local*
ment Act 1890 has been practically followed.

sen to move the order absolute was not called upon.

HODGES, J. This was an application to review an order
y justices against the defendant for the recovery of a
rate. The order *nisi* was granted on the ground that
rticulars annexed to the summons were not sufficient, and
o other points. (His Honor read the form of particulars.)
nveys to the defendant no information as to the time in
of which the rate was made. It is said that that might
te that was made without any regard to time; if that were
according to the undisputed facts in this case, the defend-
s not liable, because he was neither the owner nor occupier
ime the rate was made, and I think I must take it that the
did not decide that the rate was of such a character, and

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the evidence goes to show that it was not of any such character. One witness says—"The municipal rate for which he is sued runs from the 30th September 1896 to the 30th September 1897." He does not say that that is the period for which the rate was made, but I think the justices might infer from that evidence that that was the period in respect of which the rate was made. No information is given to the defendant on the subject. I do not mean to say that those particulars would necessarily impose upon the justices the obligation to dismiss the complaint, but they have to look at those particulars in connection with the other objections taken and the evidence. The other objection taken was that the Court should have apportioned the amount. Looking at those particulars, and feeling satisfied that what was being charged was a rate for a particular period, it becomes important to ascertain in respect of which period the rate was being charged for, in order to see whether it should be apportioned or not. I pass, however, to the last objection, to show that the date was important; it was "that no demand was made." Not that the demand, according to one witness, had been posted to the defendant's address—i.e., addressed to him at these premises; he had been in occupation of the premises at the time that letter was posted to him it would be strong evidence of a demand having been made, and I should be slow to believe that the defendant had not received it if the justices had arrived at the conclusion that he was not to be believed. It appears, however, that the justices did not disbelieve him as to his statement that before the demand he was no longer in occupation, and consequently there was no reason to suppose that the letter ever did reach him, and consequently no demand was made. The justices appear to have believed him and expressed regret for him. I think, considering the nature of the rate that was being sued for, that the particulars were insufficient, and that the order should be made absolute, with costs.

*Order absolute.*Solicitor for complainants: *Lamrock, Brown & Hall.*Solicitors for defendant: *Hughes & Permezel (for Pyne).*

W. H. M.

WHITE v. HARMER.

F.C.

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November 18.

Health Act 1890 (No. 1098), s. 35—By-law - Purveyor of milk - Registration.

A by-law was passed in the Town of Northcote under the provisions of the *Health Act 1890* whereby every person carrying on the trade of a cowkeeper, dairyman, or purveyor of milk is required to register himself with the Local Board of Health.

The defendant, who kept a farm in the shire of Morang, had been accustomed for many years to send milk by a common carrier to L., in Northcote, who retailed it to customers in Northcote. L. sometimes sent orders to the defendant, but as a rule the defendant, knowing the quantity required, regularly supplied L. with milk, delivery in each case being made by the carrier, who also carried milk for other farmers. The defendant, who was not registered in Northcote, was prosecuted for not having so registered himself as a purveyor of milk in Northcote, and was fined.

Held, that under these circumstances the defendant was not a purveyor of milk, and that registration was not necessary.

ORDER TO REVIEW.

This was an order to review the decision of the Court of Petty Sessions at Northcote. The information was laid by James F. White, an inspector, charging the defendant Harmer for that he did "carry on the trade of a vendor of milk in High-street in the town of Northcote without being registered, contrary to the by-law in that case made and provided." At the close of the case for the informant the information was amended by altering the word "vendor" to "purveyor." The defendant was fined 1*l.*, with 1*l.* 1*s.* costs. The defendant applied to Madden, C.J., for an order *nisi* to review such decision, but the application was refused. From this order refusing the order *nisi* the defendant appealed to the Full Court, who granted the order *nisi* on the following grounds:—(1.) That the said Thomas Harmer was not a purveyor of milk within the meaning of the by-law under which the information was laid, inasmuch as he had no place of business within the jurisdiction of the Local Board of Health at Northcote. (2.) That there was no evidence that the said Thomas Harmer was a purveyor of milk within the meaning of sec. 35 of the *Health Act 1890*.

The affidavit filed on behalf of the defendant stated that the following evidence was given:—White, the informant, stated that he knew the defendant; on the 31st August he saw a

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carter delivering milk to Lehrke, of High-street, Northcote. The defendant was not registered. He had a conversation with the defendant at a later date, and defendant had said that he would register if he had to do so, but would not pay any costs in relation to the summons issued. In cross-examination White stated that the defendant was a farmer carrying on his farm somewhere in the Whittlesea or Yan Yean district, and not residing in Northcote, and that he saw the carter on the 31st of August delivering milk; that he had also seen the carter delivering milk at Lehrke's in September 1898. W. Pretty deposed that he was a common carrier, and that he delivered milk from the defendant to Lehrke on 5th September. In cross-examination Pretty said that he was a common carrier, and carried milk for other farmers as well as for defendant, and that the farmers employed him to carry the milk instead of sending it by rail. Lehrke gave evidence that he was a dairyma residing and carrying on business in Northcote, and that the defendant supplied him wholesale with milk on the 5th September, and had been doing so for the last 16 years. In cross-examination he said that he sold the milk he received from the defendant retail to his own customers under a license he held for the town of Northcote, and that the defendant was a farmer at Janefield, and that when he wanted milk he sent orders in writing up to Harmer's place. The informant filed an affidavit stating that in addition to the above evidence Lehrke stated that the defendant had supplied him with milk daily at Northcote for the last 16 years, and he usually paid defendant for such milk when the defendant called at Northcote, but sometimes he sent a cheque to him at Morang; that he (Lehrke) did not often send orders in writing to the defendant, as defendant knew the quantity of milk he regularly took, and he only sent orders when he wanted extra milk.

The following was the by-law put in evidence on behalf of the informant:—"34. Every person carrying on the trade of cowkeeper dairyma or purveyor of milk shall on or before the 1st day of January in every year register himself with the Local Board of Health in manner following—that is to say by signing and forwarding to the secretary of the Local Board of Health a

application in the form hereunder written and every such person shall with every such application pay a fee of £1 :—

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" Application for Registration as _____

" To the Secretary of the Local Board of Health for Borough of
" Northcote.

" SIR,—I desire to be registered in accordance with par-
" ticulars in the Schedule hereunder :—

" SCHEDULE.

" Name in full _____.

" Trade in respect of which registration is desired _____

" Style or firm under which trade is carried on _____

" Every place within the jurisdiction of the Local Board of
Health at which such trade or any part of it is carried
on _____

" Period of time for which registration is desired _____
year commencing the 1st day of _____ 18—."

No evidence was called on behalf of the defendant.

Bryant to show cause—This case is covered by the authority of the decision in *Ryan v. Beadle* (a), where it was decided that this by-law imposed upon a person who sells milk the duty of registering himself in the district wherein he sells it, even although he has no shop or place of business in such district. A man may be a dairyman and a purveyor of milk as well, and though he may be registered as a dairyman in one district, he must also be registered as a purveyor wherever he carries on that business. The evidence shows that the defendant, delivered the milk in Northcote through his agent the carrier, and this had been a regular course of business for many years. This would constitute the defendant a purveyor of milk in Northcote.

[HOOD, J. The milk is sold at the farm, and the business of selling the milk is carried on there.]

It is necessary to have registration, so as to be able to trace the persons dealing with the milk supply, and to prevent unregistered persons selling milk in a district; it is possible that a person, having no place of business, may sell the milk

(a) [1897] 23 V.L.R. 164.

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by "hawking" it, merely taking delivery at the railway station. A purveyor of milk is something distinct from a dairyman, and some meaning must be given to the term. The magistrates have found as a fact that the defendant was a purveyor of milk in Northcote.

Counsel referred to the following cases :—*Garner v. Millar* (1) *Filshie v. Evington* (c).

Cussen (with him *McHugh*) to move the order absolute without being called upon.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, J., HOLROYD, and HOOD, JJ.] We think that there was no evidence to show that the defendant was a purveyor of milk in Northcote. The evidence points to the conclusion that Lehrke was a purveyor of milk, and that the defendant was a dairyman, a cowkeeper, and carried on such trade in the shire of Morar and was registered there, or at least should have been registered there. It was not necessary for him to register in Northcote. The order will be made absolute, with costs.

Bryant.—Costs should not be given against the informant, as he relied upon a former decision of the Court in *Ryan v. Beadell*, which is practically overruled by this decision.

HOOD, J. No, we do not deal with that authority, as the facts in the present case are different.

Order absolute, with costs.

Solicitors for informant : *Herald & Roberts*.

Solicitors for defendant : *Maldock, Johnson & Jamieson*.

W. H. M.

(b) [1892] 14 A.L.T. 11.

(c) [1892] 2 Q.B. 200.

IN THE WILL OF JAMES CROTTY, DECEASED.

Administration and Probate Act 1890 (No. 1060), s. 99—Duty on estate of deceased person—Assessment of duty—Appeal from determination of Master in Equity—Evidence on appeal—Practice.

1898
November 8.
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On an appeal from the determination of the Master in Equity as to the valuation of the estate of a deceased person for probate duty, either party is at liberty to call *vivâ voce* evidence, and will be allowed to use the materials used before the Master.

Box for the Master in Equity applied to the Court by motion for a direction as to what was to be done in this matter: It is an appeal from a valuation by the Master in Equity under sec. 99 of the *Administration and Probate Act 1890* (No. 1060), and no provision is made as to the form which the proceedings should take. The position taken up by the Master is that the appeal should take place on the materials which were before him when he made his valuation, and that neither party should be allowed to bring fresh evidence as to the value of the estate. The Court may reverse or amend his decision, and may saddle him with costs. It is submitted, therefore, that it should not be turned into a rehearing on fresh evidence. In *Re Black (a)* a corresponding application was made to Hood, J., in Chambers. He refused to make an order, on the ground that the matter was entirely for the learned Judge, in whose list for trial the case was, to say how or on what evidence he would act, and although when the case eventually came before Hodges, J., other evidence was, in fact, taken, it was done by consent. In this case the Master in Equity does not desire to consent, as he thinks that as the executors have made their case, and placed the matter before him, the appeal should be heard on the evidence laid before him.

Power, for the executors, submitted that the parties ought to be allowed to call fresh evidence on affidavit, or to deal with the matter anew on *vivâ voce* evidence:—The course taken in these matters is this: The executors send in their valuation of the deceased's estate to the Master. If he is not satisfied he can, under the section, bring in evidence, require

(a) [1895] 21 V.L.R. 227.

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production of books, papers, &c., and can fix the valuation. No matter how dissatisfied the executors are, they have no power under the section to bring other evidence. In this case the Master had before him the valuation of the executors and of four brokers—two called for the Master and two for the executors. The only question put to them was, "What could have been got for the shares at the time of the testator's death, if judiciously placed on the market in reasonable parcels?" The brokers gave no reasons for their valuation, and if the Court has jurisdiction to hear *vivâ voce* evidence it is a case in which it should be exercised. In *Re Black Hood, J.*, said he would leave the matter to be dealt with in the ordinary way, either on affidavit or *vivâ voce* evidence. It is, it is submitted, analogous to the case of an appeal in patent cases from the law officer—the affidavits used can be looked at and fresh evidence given on either side.

[A'BECKETT, J. What was done in *Black's Case* ?]

Vivâ voce evidence was heard.

[Box—By consent.]

A'BECKETT, J. I think, having regard to the terms of sec. 99 of the *Administration and Probate Act 1890*, the Master in Equity is the master of the situation in ascertaining the value. The executors appoint a valuator, and then if the Master is not satisfied he appoints a valuator, calls up the executors, and he may agree with them. If he cannot come to an agreement with them, the Master is at liberty to call persons before him, and it does not appear that the executor is at liberty to call other persons before the Master. There is no machinery for his so doing. He might come to a decision on the evidence of his own witnesses, and disregard that brought forward by the other side. The executor would have no means of corroborating the evidence of his valuator. It is a sort of rough process in which the Master really has to a very great extent his own way. It is assumed that he would only desire to ascertain what was the proper charge to make, and the section leaves him to adopt his own means of arriving at a conclusion, but the other side might be wholly dissatisfied with his decision, and would have no means

of calling other persons before the Master and giving evidence. The Master might perhaps accede to a request of the other side, but there is no compulsion on him to receive any other evidence tendered as against the view that he is inclined to act on. On the materials to be obtained by this means the Master has to come to a decision, and then there is an appeal from that decision, which may be heard before a jury if either party wish it. I think, looking at the character of the preliminary inquiry, and the one-sided evidence taken, that other evidence should be taken—that the person who objects that too much has been charged should have an opportunity of calling evidence. I see no objection to what is proposed—that either party be at liberty to make use of the materials used before the Master—but I think either side should also be at liberty to call *vivâ voce* evidence. The view I take seems to accord with that of my brother Hood, though it was not necessary for him to go into it as fully as I have done.

Solicitor for Master in Equity: *Guinness*, Crown Solicitor.

Solicitor for executors: *Hopkins*.

A. J. A.

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BOUCHAUD v. BOUCHAUD.

Practice divorce—"Divorce and Matrimonial Rules of 3rd February 1885," rr. 28, 114, and 136—*Respondent out of jurisdiction—Extended time for appearance—Extending time for delivering answer after 21 days fixed by r. 28 expired—Jurisdiction of Court.*

1898
October 27.
Hodges, J.

Where the respondent in a divorce suit was residing in Queensland, and the Judge had fixed the time for her appearing as within 30 days after service upon her of the citation and copy of the petition, and the citation called upon her "then and there to make answer to the petition:"

Held, that the Court had jurisdiction, even after the 21 days allowed by rule 28 of the "Divorce and Matrimonial Rules of 3rd February 1885" for filing her answer had expired, to extend the time for filing the answer, and the Court allowed 28 days' further time for filing the same.

A PETITION for dissolution of his marriage had been filed by the husband against his wife on the ground of desertion for three years and upwards. The petitioner was domiciled in Victoria, and carrying on business in Melbourne as a hairdresser,

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and his wife, the respondent, was living in Brisbane, Queensland at the time of the institution of the suit. Application was made by the petitioner's proctor to Hood, J., to fix the time for appearance under the *Australasian Civil Process Act* 1886, and the Hon. Judge altered the citation, which was in the form prescribed by the Rules of the 3rd February 1885, Form 2 in Schedule 1, giving 30 days to appear instead of 8 days, and initialled the alteration. A sealed copy of the petition and the citation were served on the respondent personally in Brisbane on the 21st of September last, and she entered an appearance after the time limited by rule 26 of those Rules for filing her answer expired within the 30 days allowed by Hood, J., within which she was to appear.

Application was now made to Hodges, J., in Chambers for an extension of the time to file her answer for 28 days, and reference was made to rules 26, 114, and 136. It was also argued that the petitioner at the time of the alteration of the time for appearance should have applied for an extension of the time for filing her answer, as otherwise the respondent must file her answer before she appeared.

Woolf for the petitioner objected that there was no jurisdiction to extend the time for filing an answer, as application therefor was not made within the 21 days allowed by rule 26 for filing an answer:—Within the 21 days there is power to apply for an extension of the time for filing an answer under rule 114, but that does not, like the Judicature Rules, give power to extend the time after it has already expired: *Kelso v. Kelso*. And, inasmuch as the Rules do provide for extending the time if the application is made at the proper time, the Judicature Rules do not apply under rule 136. The 30 days for appearance to which Hood, J., altered the citation form, which was in the words of the Schedule to the Rules of 1885, was to comply with the *Australasian Civil Process Act* 1886 (*Federal Council of Australasia* No. 3), sec. 6, sub-sec. 2.

[HODGES, J. It says the respondent is "then and there to appear and make answer—that is, at the expiration of the

days. She cannot make answer before she appears. I was going to give that answer to your argument even if the words had not been in the citation; but they are.]

The citation is in the ordinary form.

[HODGES, J. I know it is a printed form, but the Judge altered the printed form, and he necessarily alters the time for answering.]

He ought at the same time to have extended the time for answering. It would then have been within his power under rule 114. But he did not. He in fact did not fix the 30 days for appearance. The *Federal Council Act* fixed it, and he altered the citation accordingly.

HODGES, J. This is an application on the part of the respondent in a divorce suit to extend the time for filing the answer. The petitioner objects that I have no power to extend the time—that more than 21 days have expired since the citation was served, and that therefore by virtue of rule 26, which requires the answer to be delivered within 21 days after the service it is too late to deliver the answer, and that rule 136 and rule 114, which give power to extend the time for doing acts required by these rules to be done, give me no power, because that time has already expired; and that rule 114 only allows me to extend the time which exists. *Kelso v. Kelso* was cited to support that view. I have nothing to say against it, only in my opinion the time has not expired. The answer, according to the rule, is to be delivered within 21 days, but that may be extended. In this case the respondent was living out of the jurisdiction of the Court, and the petitioner, in praying leave to serve his petition, procured the authority of the Judge to this citation:—"These are to command you that within 30 days of the service hereof on you, inclusive of the day of such service, you do appear in our said Court, then and there to make answer to the petition." So according to that the person is allowed 30 days to appear, and then and there to answer. The citation would have been utterly misleading if it meant—"You are to appear within 30 days, and then you will not be allowed to answer or deliver an answer." I think that would be an utterly

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ridiculous reading of the citation. This is the petition document sanctioned by the Court. The respondent appeared within 30 days, and has come to the Court and to be allowed an extended time for delivering that answer which she is now to deliver according to that citation. Time not having expired, rule 114 admittedly gives me power to extend the time. I do not think the time is sufficient to allow a person out of the jurisdiction to answer. I shall extend the time for 28 days within which to deliver an answer. The petitioner must pay the costs of the application, fixed at 30/-

Solicitors for petitioner : *Gillott, Bates & Moir.*

Solicitor for respondent : *Benjamin.*

A. J.

1898
November 8.

A'Beckett, J.

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED
SCOTT.

Will—Construction—Ademption—Insurance moneys—Insured buildings with land—Destruction by fire after will—Intention by testator to rebuild

A testator devised his "freehold land and property situate in &c. formerly known as number " so-and-so to certain individuals. The buildings on this land had been insured by him against fire, and after the making of his will the buildings were destroyed by fire. He obtained the insurance money from the Insurance Company, and intended to rebuild the premises, but before he had entered into any contract for so doing he died.

Held, that the devisees were not entitled to the insurance moneys, nor were the executors bound or justified in expending them in rebuilding.

ORIGINATING SUMMONS taken out by the Trustees Executors and Agency Company Limited, the executors of the will of William Dean, deceased, against his daughter Yarrena Dean, his widow Mary Ann Dean, and his daughter Laura Dean, three of the beneficiaries under his will, to determine certain matters arising in the execution of the trusts of his will, the only one material to this report being the following:—

By his will made on the 3rd October 1890 the testator provided as follows:—"I devise my freehold land and property situate in Flinders-lane in the city of Melbourne

aforesaid and formerly known as number 91 and now as number

and now in occupation of the firm of 'William Dean & Co.' with the appurtenances thereto belonging unto my daughter Yarrena Emily Scott the wife of Arthur Wolsey Scott of Sydney in the colony of New South Wales for her life without impeachment of waste but so nevertheless that she shall not have power to dispose of or charge her estate or interest in the said land and premises or any part thereof or the rents and profits thereof by way of anticipation. And from and after the death of my said daughter Yarrena Emily Scott I devise the said land and premises to such use or uses for such estates and in such manner for the benefit of all or any one or more of the children of my said daughter Yarrena Emily Scott as she shall by any deed or deeds with or without power of revocation and new appointment or by her last will appoint and in default of appointment to the use of her child if only one or of her children if more than one in equal shares as tenants in common in fee simple with cross executory limitations of the shares original and accruing of each of such children in the event of his or her dying under the age of 21 years to the use of the others in equal shares in fee simple. And I declare that in the event of the said Yarrena Emily Scott leaving no issue her surviving or leaving issue but all such issue dying under the age of 21 years then and in either of such events the said land and premises shall fall into and form part of my residuary estate." The buildings on this property, which had been used by him to carry on a partnership of "William Dean & Co.," had been insured against fire by him for 4000*l.*, and on the 21st November 1896 they were destroyed by fire. Some time prior to his death the testator received from the insurance company 4000*l.* under the policy of insurance.

An affidavit was filed which had been made by Alfred William Walsh, cashier of the testator, stating that on the day Mr. Dean received the 4000*l.* from the insurance company he asked Mr. Dean if he should deposit it with other moneys to the credit of "William Dean & Co.," but that Mr. Dean replied that the money did not belong to the business, and that he intended placing it on deposit with the National Bank of Australasia at

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interest, so that it would be available when he made up his mind how he would rebuild; that Mr. Dean afterwards told him that he had placed the amount on deposit at interest in the bank. The deponent also stated that, from subsequent conversations with the testator, he believed that it was his intention to rebuild on this property if he had lived.

An affidavit was also filed which had been made by Leonard John Flannagan, architect, which stated that he had acted as architect for Mr. Dean since 1888. That in May of 1898, shortly before Mr Dean's last illness, he had a conversation with him with reference to this property as follows :—Mr. Dean said :—“ Well, Flannagan, as I suppose you can imagine, I have been inundated by architects in reference to rebuilding; but they have acted for me so long that of course I would not pass up an opportunity. Well, I am not ready to go on at once, but I am glad to hear of you, as you might be thinking over the matter, and get a rough sketch, so that you will have something to show me when I come to see you, which will be before long.” I asked him to put down his ideas were, and what he would spend, and he said—“ I have not made up my mind whether to put two or three stories on the land, but I shall not go back there myself, and will let whichever would be best for letting. I have put the insurance money aside, and would add what more was necessary, but it would not exceed 6000*l*.” This deponent further said that in consequence of this conversation he did prepare rough sketches, but was unable to submit them to the testator on account of his last illness, and that from what he said on the occasion above mentioned he believed that it was the testator's intention to rebuild on this land.

These two affidavits were read subject to an objection that they were inadmissible as evidence. The testator did not rebuild prior to his death.

An originating summons was taken out by the plaintiff company as executor and trustee of the estate against the testator's daughter, Yarrena Emily Scott, and his widow, Ann Dean, and daughter, Laurena Agnes Dean, who were otherwise interested in the testator's estate under his will, to determine *inter alia* the following question :—

"1. Whether upon the construction of the will of the said William Dean the plaintiff hereto as trustee thereof should pay to the defendant Yarrena Emily Scott a sum of money amounting to 4000*l.*, or any part thereof, or the income derivable from such sum of 4000*l.* which the said William Dean received prior to his death as insurance money in respect to the destruction by fire of certain buildings situate on a piece of land in Flinders-lane, in the city of Melbourne, which land together with the buildings thereon the said William Dean had by his will specifically devised to the said Yarrena Emily Scott for her life ; or whether the plaintiff should, in discharging the trusts of the said will, replace the buildings hereinbefore mentioned, and in so doing should apply the said sum of 4000*l.* to such purpose?"

Agg for the plaintiff company, asked the Judge, if he should think it necessary, to make an order that the defendant, Mrs. Scott, should represent her children.

Weigall for the defendant Mrs. Scott—The testator gave to Mrs. Scott and her children the "land and property" in Flinders-lane. The "property" was destroyed by fire, but he put by the sum of money which represented it, and intended that such money should be applied in rebuilding on this land. The form of the subject of gift to Mrs. Scott and her children has been altered ; but the testator has carefully preserved its substitute, and where that is so, it is submitted that it passes under the will : *Clark v. Brown* (a) ; *Morgan v. Thomas* (b) ; *Moore v. Moore* (c) ; *Manton v. Tabois* (d).

Guest for the testator's widow and daughter Laurena Agnes Dean—It is submitted that the testator has adeemed so much of the devise to Mrs. Scott and her children as was represented by the buildings : *Asburner v. Macguire* (e), in the notes to which the cases relied upon *contra* are dealt with. There are no words in this devise sufficiently wide to cover the property in its

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(a) [1854] 2 Sm. & Giff. 524.

(d) [1885] 30 Ch. D. 92.

(b) [1877] 6 Ch. D. 178.

(e) [1786] 2 Wh. & T. L.C. in E.

(c) [1860] 29 Beav. 496.

(6th ed.), 546.

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changed state. It is a devise of real estate, and cannot money.

[A'BECKETT, J. Mr. Agg mentioned that there was one in which the Court decided as to insurance money. Have that?]

Yes; it was insurance money of personal chattels which testator was carrying at sea. Both the chattels and the testator were lost at sea at the same time, and the Court held the legatees of the chattels were not entitled to the insurance money received after his death by his executors: *Durra Friend (f)*.

[A'BECKETT, J. Yes, that apparently is an authority that a gift of chattels is not a gift of the insurance money on chattels. If the testator died before the chattels were lost before the chattels were lost his executors assented to legacies, I suppose the legatees would be entitled to the insurance moneys.]

Yes, because they would, as soon as the executors assented to the legacies, have an interest in the property at the time the property was lost. Here Mrs. Scott and her children had no interest in the property when the fire took place. The testator, having lived, would probably have rebuilt, but he was not compelled to do so, and *non constat* that he had not altered his mind at that. It is submitted he adeemed so much of the devise as the building represented.

[A'BECKETT, J. I rather agree with you. I do not think those cases of Mr. Weigall cover this case. I do not see sufficient connection between the money which is the result of a bequest in reference to the house which is on the land and the land to pass that money by a bequest of the land and house. The insurance money is the proceeds of a contract for indemnity, and I do not think it would pass. But what I was thinking was: suppose this man had insured this property, and it was insured against fire, and he died, and was afterwards burnt, then the devisee would be entitled to the benefit of the insurance. But why? that is the question. It seems to give a right to a devisee to have an interest in a policy of insurance, and if you can read this case

(f) [1851] 5 De G. & Sm. 343.

as a devise of the policy of insurance, then the money arising from the policy is set apart.]

[*Agg—Bunyon on Fire Insurance* (3rd ed.), p. 253, refers to the matter, but cites no authority.]

Sec. 22 of the *Wills Act* 1890 (No. 1159), makes the will as to the real and personal property comprised in it speak from the death, not from its date.

A'BECKETT, J. In this case a claim is made to some insurance moneys—moneys received on a policy insuring the buildings against fire. This money appears to have been put to a separate account, and I have little doubt that the testator intended to apply that money to building on the land which is devised to the lady represented by Mr. Weigall. It appears also that the testator intended to add to that money—to spend more than the amount of the insurance in so building. But, however, he had done nothing in his lifetime which would even authorize his executors to treat this money as to be appropriated and applied to buildings. They could not do that. The intention which he had shown was not enough to set apart this fund as a fund by law applicable to building on the land in question, and the lady who claims that this money shall be applied for her benefit rests her claim on probably the only ground it could be based—nameiy, that it passes under the devise of the “land and property known as number” so-and-so. It is argued for her that those words, in accordance with some cases to which reference has been made, are sufficient to include that money. The cases cited are cases in which the words of the will have been held sufficiently descriptive, under the circumstances, of the property which was claimed. I do not think the words in this case are by any reasonable intendment sufficient to cover this money. The money is merely the result of a contract which the testator had entered into with reference to these houses, and which he might have applied to any purpose he chose. It became his money. It was money which came to him because he had made a contract in relation to the house, but I do not think the devise of the land as a house is sufficient to carry that money. Therefore, the

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answer to the first question will be in the negative. The money must be treated as part of the testator's general estate. Direct costs to be paid out of the testator's general estate, those of the trustees between solicitor and client.

Solicitors for plaintiff: *Godfrey & Godfrey.*

Solicitors for defendant Mrs. Scott: *Godfrey & Godfrey.*

Solicitor for other defendants: *Blair.*

A. J. A.

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October 13.

Hodges, J.

IN RE McLEAN.

Administration—Regulæ Generales, 23rd June 1873—Rr. 6, 19—Company applicant for letters of administration—Affidavit of search for will made by applicant's manager.

In an application for letters of administration to a company an affidavit by the manager of the company that "he has caused to be made careful inquiry and search for a will" is sufficient, and the manager may cause such inquiry to be made by his proctor.

THIS was an application by the Perpetual Executors and Trustees Association of Australia Limited that letters of administration be granted to them in the estate of Robert McLean, deceased. The manager of the company in his affidavit in support swore as follows:—"I have caused to be made careful inquiry and search for a will or other testamentary writing, but I am unable to find any will of the deceased, and I verily believe he did not leave any will."

Kilpatrick in support—The Registrar of Probates has raised the objection that the affidavit does not say that the inquiries as to a will were made by the manager personally. By rule 6 of the Regulæ Generales of the Supreme Court as to Probate and Administration of 23rd June 1873 (vol. iv. of Victorian Statutes, at p. 2796), it is provided that the affidavit shall set forth "that the applicant has carefully inquired if there be a will." Here the applicant is a company, who can only inquire by its manager. In the present case the manager employed his proctor to make the inquiries. The deceased was resident in the country. Rule

19 of the same rules provides "that this Court may depart from the strict language of these rules in all cases in which special circumstances or justice may require."

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HODGES, J. If I am to read rule 6 strictly, it will require that the company and not its manager is to make special inquiry. That is a thing a company cannot do. I am not sure that within rule 6 the manager of the company can make the affidavit as to inquiry if he has made the inquiry, not personally, but through someone else employed by him for that purpose. I think, however, that the power conferred on this Court by rule 19 empowers me to grant this application, and accordingly I overrule the objection of the Registrar, and letters of administration will be granted to the company.

Proctors : *Willan & Colles* (for *Wade & Silvester*, Coleraine).

A. F. M.

GEELAN v. RYAN.

Police Offences Act 1890 (No. 1126), s. 6—By-law—Obstruction of carriage way by loitering—"Loiter," meaning of—Alleged loitering by flower-selling.

1898
October 12.
Hodges, J.

Under the provisions of sec. 6 of the *Police Offences Act 1890*, a by-law was made by the City of Melbourne Council in the following terms :—

"Any person obstructing any carriage way footway or public place within the city of Melbourne by standing or loitering therein or thereon shall upon being required so to do by any member of the police force discontinue such standing or loitering."

Held, that a person who was actively engaged in flower selling, and was standing at or near one place for some time and obstructing the carriage way, could not be convicted of loitering under this by-law.

ORDER TO REVIEW.

The defendant was charged before the District Court at Melbourne with infringing a by-law made under sec. 6 of the *Police Offences Act 1890*. The by-law was—"Any person obstructing any carriage way footway or public place within the city of Melbourne by standing or loitering therein or thereon shall upon being required so to do by any member of the police force discontinue such standing or loitering."

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The evidence of the informant (a police constable) was that the defendant and others were selling flowers from a basket in the carriage way close to the water-channel in Swanston-street, in the city of Melbourne. Defendant was moved on and ordered to discontinue loitering. He moved and returned to where he had been standing. He was a flower-seller, and was pursuing his business of selling flowers. The effect of defendant and the other sellers standing where they did was that persons or vehicles could not come in to the edge of the footway.

Defendant called no evidence, but it was contended for him that, on the evidence, it appeared that he was busily engaged plying his business at the time he was accused of loitering, and that evidence as to the conduct of the other flower sellers should not have been admitted.

The bench fined defendant 1*l.*, in default one week's imprisonment.

The grounds of the order to review were that—

1. There was no evidence that the defendant loitered.
2. The justices wrongly construed the meaning of loitering in the by-law.
3. Assuming that the defendant did loiter, there was no evidence that he did not discontinue such loitering on requirement by a member of the police force.

Dethridge to show cause—To loiter means to move or wander idly and slowly about, and there is evidence that defendant was doing that. The way these flower-sellers conducted their work was equivalent to a nuisance.

[HODGES, J. I have nothing to do with that now. If it is a nuisance then the police must take a different remedy.]

The street is to be used by the public to walk along as a right-of-way; they have an easement over it, but no right to occupy it to conduct business. Defendant had not a hawker's license. Such a by-law as this is to be read liberally : *Kruse v. Johnson* (a).

Paul to move the order absolute—This by-law renders the

(a) [1898] 46 W.R. 630, at p. 632.

defendant liable to fine or imprisonment, is in its nature penal, and therefore must be strictly construed. Loiter connotes an idle waste of time, not a use of time to do something. This defendant was as busily engaged in pushing his wares as he could be. A by-law which says that no man for any object shall obstruct the street would be *ultra vires*.

HODGES, J. In this case the defendant was convicted of obstructing a street by loitering and breaking a by-law. (His Honor read the by-law.) It is not disputed that there was some obstruction to the street created by the defendant, but the question is whether the accused was loitering. It appears from the evidence that he was as busy as he could be selling flowers. But it is said that because this business did not take him far away from one spot in the street, that therefore he was loitering. The contention on behalf of the prosecution is that by reason of the words in the by-law "standing or loitering," loitering must be construed to mean any hovering about any one particular part of the street, and that if a person remains any considerable length of time in or near one spot then that is loitering in or about or near that spot. A man using all the energy he possessed, and working as hard as he could in erecting a pillar would be loitering according to that view, or a man building a brick wall, or a man using all his powers in sinking a shaft for a sewer. But that is in direct conflict with the ordinary meaning of the word. There is in my opinion implied in the meaning of the word "loiter" some amount of inactivity, and it is an essential ingredient in loitering that there should be an absence of energy. I therefore think that the justices were wrong in holding that a person is guilty of loitering simply because he does not move far from some one spot. I am not prepared to express an opinion as to the particular form of obstruction which was intended to have been hit by this by-law. It may have been intended to prevent persons standing about idly or moving slowly, objectlessly, and aimlessly along the street. If more than that was intended by it I do not think the framers have been successful in an endeavour to express it. The by-law

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does not cover a case like the present one, and therefore order to review will be made absolute, with costs.

Solicitors for informant : *Malleson, England & Stewart*

Solicitors for defendant : *A. D. J. Daly.*

1898
October 27,
December 6.

Hodges, J.

[IN CHAMBERS.]

IN RE THE DOMINION BANKING AND INVESTMENT CORPORATION
LIMITED (IN LIQUIDATION).

Lien—Banker's lien—Security—Waiver of lien.

In February 1892, G. gave the Dominion Banking Corporation a note, due in August 1892, which the corporation indorsed to J. J. the note with the City of Melbourne Bank, he indorsing the note to The note fell due and was dishonoured, and the bank sued G. and obtained judgment, but received no satisfaction in respect of the note. In 1894 the Melbourne Bank wrote to J. asking him to sign a letter requesting that he place the amount of the note to the debit of his then overdrawn current account with the bank, and further asking him to sign a cheque for the amount. J. complied with both requests, and the amount of the note was accordingly paid to his account. J.'s overdrawn account was secured. Before this took place the City of Melbourne Bank, together with another bank, in 1894 agreed with G. to call for or require payment of the moneys owing which might accrue during a period of five years from the date of the agreement. The bank was to have the right of selling at any time before the expiration of five years any property which might hold. The Dominion Banking Corporation went into liquidation, and the liquidator of the City of Melbourne Bank, which had also gone into liquidation, sought to prove in the winding-up of the corporation in respect of this note, asserting that it had a lien in respect thereof.

Held, that under these circumstances the City of Melbourne Bank had no lien, and was not entitled to prove in respect of the note.

THIS was a summons taken out on behalf of the liquidator of the City of Melbourne Bank Limited to decide the following question arising in the winding-up of the Dominion Banking and Investment Corporation Limited—also in the winding-up of the City of Melbourne Bank Limited—“Is the City of Melbourne Bank, or is any other, or so what person or corporation, entitled to prove or claim credit in the winding-up of the Dominion Banking, or in the winding-up of the City of Melbourne Bank, or in the winding-up of the Corporation in respect of two several promissory notes made by G. to the Dominion Banking Corporation?”

Samuel Gardiner in favour of the Dominion Banking, etc., Corporation, each dated 26th February 1892 and payable six months after date ? ”

The following facts were set out in the affidavit:—On the 26th February 1892 one S. Gardiner gave the Dominion Banking, etc., Corporation a promissory note at six months for 4,000*l.* due 29th August 1892. This promissory note the Corporation indorsed to C. H. James in part payment of a promissory note of its own payable by it to C. H. James ; an interest promissory note of Gardiner's for 71*l.* having same date and currency was also indorsed for the like purpose by the corporation to C. H. James. Both were on the 15th March 1892 discounted by C. H. James with the City of Melbourne Bank, he indorsing them to that bank. Both notes were dishonoured. Notice of dishonour was given by the bank to the corporation. Neither note upon its dishonour was passed to the debit of C. H. James's account, which was then a current account overdrawn. Gardiner was sued and judgment recovered, but nothing further was done. Two years afterwards the bank wrote to C. H. James stating that it could not obtain any satisfaction from Gardiner in respect of the notes and stating that it proposed to debit his (James's) account with the amount. Then by verbal arrangement it was agreed that the bank should debit James's account as proposed, and it wrote asking James to sign a letter requesting that this should be done, and also to sign a cheque for the amount. C. H. James complied with this request and the amount of the notes was debited to his account. James's account at this time was overdrawn as stated above, and the overdrawn account was secured. At the time these arrangements were being made—viz., in March 1894—an agreement had been entered into between James, the City of Melbourne Bank, and the Commercial Bank, by which the two banks practically arranged to carry on James for a period of five years from the date of the agreement. By clause 7 of the agreement it was provided : “ If the said C. H. James shall duly observe and perform all the conditions and stipulations on his part contained herein and except as hereby varied contained in the said securities and every of them then notwithstanding

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anything to the contrary in the old securities or in the new securities contained or to be contained the said banks shall not nor shall either of them call for or require payment of the moneys owing or accruing due or which may hereafter accrue due to them the said banks respectively or to them jointly or which from time to time during the continuance of this agreement may be advanced to the said C. H. James or paid on his account on his behalf or to his use by the said banks or either of them under the said securities or any of them before the expiration of the term of five years from the date hereof. But notwithstanding this provision it shall be lawful for the said banks respectively to sell at any time or times before the expiry of the said five years any of the property comprised in the said securities at such price or prices as they the said banks respectively may think fit and the said C. H. James shall concur in any and every sale so made for the purpose of giving effect thereto."

The Dominion Banking, etc., Corporation was wound up voluntarily in October 1895, and on the 7th December 1896 an order was made by the Court ordering that the voluntary winding-up of the corporation should be continued subject to the supervision of the Court. The City of Melbourne Bank subsequently went into liquidation. The estate of C. H. James was sequestrated in 1897.

The liquidator of the City of Melbourne Bank claimed to rank on the estate of the corporation in respect of these two promissory notes. The question of its right so to prove was now raised by this summons.

Weigull for the liquidator of the City of Melbourne Bank in support of the summons.

Mitchell for the liquidator of the Dominion Banking, etc., Corporation to oppose.

Cur. adv. vult.

HODGES, J. The dispute in this case is which party is entitled to prove on certain promissory notes. The liability of

inion Bank is unquestioned, but the dispute is as to
 the City of Melbourne Bank is entitled to prove on
 tes or whether the trustee of the estate of C. H. James
 ed to prove. The notes in question are two promissory
 e for 4,000*l.* due on the 29th August 1892, and the other
 due on same date. These notes were indorsed by C. H.
 o the City of Melbourne Bank; that bank discounted the
 he notes fell due and proceedings were taken upon them
 S. Gardiner, who was the maker of the notes. Nothing
 from these proceedings, though judgment was obtained,
 reupon the City of Melbourne Bank proposed to debit
 James's account with the amount of these two notes. C. H.
 t this time had an overdrawn account with the City of
 ne Bank. He was communicated with and asked to sign
 e and also a letter requesting the bank to debit his
 with these notes and to hold the same for collection.
 gned the cheque and the letter, and the bank thereupon
 his account—that is, his overdrawn account—with the
 of the notes and at the same time held them for
 n. It is contended on behalf of the City of Melbourne
 at it at this time has a lien on these promissory notes,
 is the question I have to determine. If the bank has
 hen it has no right to prove. There is no doubt as to
 eral principle that a banker has a lien upon all
 ts in his hands to secure payment of a customer's
 lness unless the circumstances under which the docu-
 taken or under which it is held rebut that inference
 that the banker has waived his right to that lien.
 not necessarily follow from this bank having debited
 tes to James's overdrawn account, even although that
 was secured, that it had waived its lien or that its
 s gone. But if the terms of the contract securing
 ount are inconsistent with the lien, then its lien

his case the overdrawn account was secured in a way
 howed that the bank did put an end to any lien it might
 d on these documents. When it debited James's account
 is amount, and took a cheque for it, it was contended that

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this was a mere book entry, and that there was really no entry in it. But in my opinion it was more than that. In the place, this account in which the bank had debited James these promissory notes was specially secured by mortgage. Then there was also an agreement with James and the Commercial Melbourne and Commercial Banks, under which, to pay off, shortly, the banks were to carry on James for five years from the date of the agreement which was March 1894. The second clause of this agreement, contained the following provision: (His Honor read the clause). Now, the liability of James for these notes had been debited to his account at the bank's request, and with his consent, and that account could not be called for a period of five years. The bank had securities, with a right to sell. This, in my opinion, is inconsistent with the right on the promissory notes which a party is entitled to deal with promptly, and to take proceedings in respect of as and when he pleases. I was referred to the case of *In re Taylor, Stiles and Underwood* (a), and at page 597, Lindley, L.J., said: "Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case. In the particular instance we are dealing with a solicitor and his client. It strikes me that if a solicitor takes from his client a security as this solicitor took, the *prima facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker I should not draw the same inference, since a banker has not a similar duty towards his customer." That state of affairs is not similar to the present case, because the facts of this case show that what was done was done at the request of the bank, and with a knowledge of all the circumstances, and in the language of Lindley, J., we must look at "the position of the parties and all the circumstances of the case," and I arrive at the conclusion that it was not intended by the bank after it debited that account in that way that it should hold the promissory notes

(a) [1891] 1 Ch. 590.

were overdue as security for the payment of that account, and not being entitled to enforce payment of that account, then it was inconsistent that it should hold the promissory notes as security. The question will be answered accordingly that the City of Melbourne Bank has no right to prove in respect of these notes. The costs will be costs of the liquidation for both institutions.

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Solicitors for Dominion Banking Corporation : *Braham & Pirani.*

Solicitors for City of Melbourne Bank : *Blake & Riggall.*

W. H. M.

PRACTICE COURT.

CRAMPTON v. STARR.

Licensing Act 1890 (No. 1111), s. 128—Selling liquor or permitting liquor to be drunk on licensed premises otherwise than during licensed hours—Lodger.

1898
 December 14.
A'Beckett, J.

By sec. 128 of Act No. 1111 it is an offence "if any liquor is sold or disposed of to or suffered or permitted to be drunk on or from any licensed premises by any person whatsoever otherwise than during the hours . . . authorized by the license."

A constable entering licensed premises after the hours during which a sale of liquor was authorized by the license found a person who was lodging at such premises purchasing and being supplied with drinks in the bar parlour, together with some other persons whom he had invited to drink with him. The drinks were supplied in the ordinary way by the barmaid, though the licensee had retired and knew nothing about the transaction.

Held, the fact of the person who was supplied with liquor being a lodger did not prevent the application of the provisions of sec. 128, and that an offence against the Act had been committed, and that there was evidence to show that such sale of liquor had been "permitted" by the licensee.

ORDER *nisi* to review.

The informant, who was a licensing inspector, proceeded against the defendant under sec. 128 of the *Licensing Act* 1890 for having sold or permitted liquor to be drunk upon his licensed premises during prohibited hours. It appeared that a police constable, entering the licensed premises shortly after midnight, found a person who was lodging at such licensed premises drinking in the parlour and providing two

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other persons, who were his guests, with liquor. The licensee had retired to bed at the time, and it appeared that the liquor was supplied by the barmaid, and the bar apparently was locked at the time. It was asserted by the lodger that he had a right to obtain drinks at any time and to invite any friend to drink with him. The justices dismissed the information, and an order nisi was obtained to review the decision on the ground that upon the evidence the justices should have convicted the defendant.

Gaunson to show cause.

[The Judge intimated that he would like counsel for the informant to state his arguments first.]

Sanderson to move the order absolute—Sec. 128 is absolute in general in its terms, and refers to “any person whatsoever.” In sec. 134, which relates to Sunday trading, an exception is made clearly and distinctly made as to “lodgers and bona fide travellers.” So that sec. 128 intentionally includes all persons. In the English Act an express exception is made to this effect, and it was because of this exception that the case of *L. Barnes (a)* decided that a licensee was not liable to be convicted. In the case of *Ovenden v. Raymond (b)*, under a section prohibiting a billiardroom being kept open after certain hours, a lodger was permitted by the licensee to play after the authorized hours, and the licensee was convicted.

Counsel referred to *Cohn v. Sherwood (c)*.

Gaunson to show cause—If sec. 128 applies to every person without any limitation, then it would be an offence for a licensee to supply liquor to any guest or to his own family in case of illness. Some limitation must be imposed upon the general words. There was no evidence to show that the defendant permitted the liquor to be drunk; he had no knowledge of what was being done, and some distinction must be drawn between “suffering” a thing to be done and “permitting” the same: *Somerset v. Hart (d)*. There is no evidence

(a) [1887] 20 Q.B.D. 221.

(b) [1876] 34 L.T. 898.

(c) [1870] 1 A.J.R. 132.

(d) [1884] 12 Q.B.D. 360.

anyone was left in charge for the purpose of liquor being supplied.

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A'BECKETT, J. This was a case in which a hotelkeeper was proceeded against for selling liquor or permitting liquor to be drunk upon his premises otherwise than during the hours authorized by the license; the obligation being upon the licensee to suspend business after half-past eleven at night, whereas the sale of liquor complained of took place after that hour. A police constable came in and found a man with his friends drinking on the premises, and being supplied in the ordinary way in the bar-parlour. The person was undoubtedly a lodger, and asserted his right so to act. The section which prohibits the sale of liquor or drinking on the licensed premises after the prohibited hour contains general terms and amounts to an absolute prohibition; it does not except boarders or travellers, or anyone else. Under certain circumstances one can imagine an innocent infraction of the prohibition and the absolute prohibition might work occasionally very prejudicially and create great inconvenience, but in the case before me, so far as the operation of the section is concerned, I should say that there was a distinct doing of that which the Act intended should not be done. The business was being kept going for the convenience of the lodger at 12.30 a.m., and there were persons being invited to drink and drinking, the publican deriving the profits therefrom, during the prohibited hours. Though, as I have said, some cases might arise which would enlist one's sympathy, this is certainly not such a case. This was a distinct infraction of the law. It is said that the decision of the justices proceeded upon the ground that a "boarder" was not included in the words "any person whatsoever." I do not understand that they did so base their decision; it seems rather to proceed upon the ground that that which was done was not done with the permission of the licensee, and if I could find that the evidence was not sufficient to show permission I should uphold their decision. But I think that as to permission the case is clear, and more evidence could hardly be required. The bar should have been locked up at that time, but there

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appears to have been no difficulty in obtaining access to the
 and it was proved that the barmaid, the usual person employed
 sold these persons these drinks. The order will be absolute
 with costs, the case to be remitted to the justices.

Order absolute

Solicitor for informant : *Guinness*, Crown Solicitor.
 Solicitors for defendant : *Gunson & Lonie*.

W. H.

1898
 December 13.
 —
 A'Beckett, J.

[IN CHAMBERS.]

OWEN v. WHITEHURST AND FULFORD.

County Court Act 1890 (No. 1078), s. 51—Remitting action of tort to County Court—One of two co-defendants out of jurisdiction—Right of one defendant to have action remitted to County Court.

In an action of tort against two defendants, where one of the defendants is resident out of the jurisdiction the defendant resident within the jurisdiction is entitled to apply for an order under sec. 51 of the *County Court Act 1890* upon the plaintiff to show cause why the action should not be remitted to the County Court.

But *semble*, per A'BECKETT, J., it is a good ground for not remitting the action to the County Court that one of such co-defendants is resident out of the jurisdiction.

THIS was a summons under sec. 51 of the *County Court Act 1890* on behalf of the defendant Whitehurst for an order that the action should be remitted to the County Court unless the plaintiff should give security or satisfy the Judge the action was fit to be prosecuted in the Supreme Court. The action was brought by the plaintiff Owen against the defendants Whitehurst and Fulford claiming damages for a libel alleged to have been published by the defendants. The defendant Fulford was resident out of the jurisdiction and had not entered an appearance. The defendant Whitehurst took out the present summons and filed an affidavit showing that the plaintiff had no visible means of paying the costs of the defendant should a verdict not be given for the plaintiff. This affidavit was uncontradicted. A suggestion of the learned Judge, when the application was made

It was adjourned to enable the defendant Whitehurst to obtain the consent of the other defendant, but this the defendant Whitehurst was unable to get.

Whitehurst for the defendant Whitehurst in support of the application—One of two co-defendants can make an application under this section: *Gooley v. Finn* (a). The question as to the remedy the plaintiff can pursue against the defendant is not to be considered at this stage, as the present defendant is entitled to a conditional order: *Taylor v. Port* (b); *Port v. Bennett* (c). The latter case also shows that although the County Court might not have had original jurisdiction over the defendant Fulford still the order remitting the action will remove that difficulty.

Arthur to oppose—Sec. 51 of the *County Court Act 1890* does not apply to one of two co-defendants; it refers distinctly to the defendant. The conditional order should not be made if it is clear that the plaintiff can show good cause why effect should not be given to it when it comes on for argument. The action in the Supreme Court can proceed against the defendant who is out of the jurisdiction, while in the County Court he is debarred from so doing. There is no authority which decides that the order remitting the action will remove the effect of want of jurisdiction.

BECKETT, J. In this case my present impression is that when I made this conditional order and it came before me subsequently, I should not send the case to the County Court. The plaintiff could not get judgment against the defendant in the County Court, and he could do so in the Supreme Court. As to cause being shown when the plaintiff is to argue upon the return of this conditional order, the conduct of the plaintiff towards the co-defendant who is out of jurisdiction will in my opinion be a reason for declining to send the case to the County Court. I am not inclined to put the

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(a) [1893] 15 A.L.T. 85.

(b) [1884] 10 V.L.R. 300.

(c) [1894] 20 V.L.R. 50.

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parties to the expense of a reference to the Full Court, Hood, J., was under the impression that one of two co-defendants could apply, I will allow the conditional order to go. So the affidavit as to want of means is concerned, it is uncontradicted and as I am not at liberty to consider the main point raised at this stage, according to the decision in *Taylor v. Port*, I will make the order.

Solicitors for plaintiff: *Cameron & Rennick.*

Solicitors for defendant: *Gillott, Bates & Moir.*

W. H.

1898
 December 8.
A'Beckett, J.

IN RE WILLIAM JOHN VANDERBILT.

Practice—Supreme Court—Insolvency—Order nisi—Insolvency Act 1890 (No. 37 (vi.) and 38—Insolvency Rules of 10th March 1898, r. 187—Form No. 6—Act of Insolvency—Debtor's summons—Service "in prescribed manner"—Neglect to pay, etc., "for the space of fourteen days"—"Within fourteen days"—Omission of statement of failure to secure.

One of the acts of insolvency as alleged in sec. 37, sub-sec. vi., is "a creditor presenting the petition has served in the prescribed manner on the debtor a summons requiring the debtor to pay a sum due of an amount less than 50*l.* and the debtor has for the space of fourteen days succeeded in the service of such summons neglected to pay such sum or to secure or compound for the same."

Held, that an order *nisi* which stated that "the act of insolvency committed by him was that he did neglect . . . within fourteen days for the service on him of a debtor's summons . . . to pay the said . . . therein claimed or compound for the same . . ." was sufficient where in another part of the order *nisi* it was stated that the petitioner's debt was wholly unsecured.

ORDER *nisi* for the sequestration of the estate of William John Vanderbilt on the petition of Joseph Henry Davidson and William Telford Davidson.

The order *nisi* was as follows:—

"Upon reading the petition of the abovenamed petitioner this day presented to me the Honorable Sir John Madden and the Judges of the Supreme Court of the colony of Victoria setting forth that the abovenamed William John Vanderbilt of Rathdown-street North Carlton in the colony of Victoria produce merchant is now justly and truly indebted to the petitioners in the sum of 1316*l.* 18*s.* 4*d.* being the a

adjudged to be paid by him to them in an action in the Supreme Court of the colony of Victoria numbered 844 of the year 1897 wherein Catherine Isabella Henrietta Davidson and Ethel May Davidson Henry Davidson and Allan Davidson infants under the age of twenty-one years by their next friend the said Catherine Isabella Henrietta Davidson were plaintiffs and the said William John Vanderbilt and James Edward Geake were defendants which said sum of 1316*l.* 18*s.* 4*d.* is now due and owing and that the petitioner's said debt is wholly unsecured and that the said William John Vanderbilt has committed an act of insolvency within six months before the presentation of the said petition and that the act of insolvency committed by him was that he did neglect or refuse within fourteen days from the service on him of a debtor's summons served on him by the said petitioners on the 20th day of October 1898 to pay to them the said sum of 1316*l.* 18*s.* 4*d.* therein claimed or compound for the same to their satisfaction and praying that the estate of the said William John Vanderbilt may be sequestrated for the benefit of his creditors. And upon reading the several affidavits of Arthur Cephas Secomb Joseph Henry Davidson and William Telford Davidson respectively sworn and filed herein. And the allegations contained in the said petition having been proved to my satisfaction I do by this order under my hand place the estate of the said William John Vanderbilt under sequestration in the hands of," etc.

No notice of objections was filed.

Agg for the petitioners moved the order absolute.

Woolf for the respondent—Sec. 43 of the *Insolvency Act* 1890 (No. 1102) provides that every order *nisi* shall set out the act of insolvency relied upon. The act of insolvency on which the petitioners in this case purport to proceed is that set out in sub-sec. vi. of sec. 37 of the Act, which is that the creditor presenting the petition has "served in the prescribed manner" on the debtor a debtor's summons requiring him to pay the sum due, "and the debtor has for the space of fourteen days succeeding the service of such summons neglected to pay such sum or to secure or com-

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pound for the same." This order *nisi* does not say the petition was served "in the prescribed manner," that being the manner provided in rule 187 of the Insolvency Rules of March 1898. It says that he neglected or refused to compound "within fourteen days from the service," instead of "for the space of fourteen days succeeding the service." It stated it might mean fourteen days before the service or only after the service. It further omits the statement that he neglected to secure the amount.

[A'BECKETT, J. I do not think much of your first objections, but this seems a serious one.]

Agg—The earlier part of the order *nisi* states that the date of the order the debt was wholly unsecured and that part that that has been proved to the Judge's satisfaction.

The section must be strictly followed, as the consequences are so serious. The Court will not allow the petitioner to set aside the order *nisi* in respect of matters of this kind under *s. 31*. *Re Penglase (a)*; *Re Reade (b)*.

[A'BECKETT, J. *Re Chambers (c)* seems a very strong authority as to that.]

In *Re Penglase* Holroyd, J., said that his impression was that he should so decide if necessary, that the omissions which were supplied under *sec. 31* were omissions of words accidentally dropped out of a paragraph, and not of statements essential to show jurisdiction.

Agg for the petitioner was not called upon.

A'BECKETT, J. These are objections taken upon the first part of the order *nisi*. The order *nisi* is very carelessly drawn. The first objection is that it states that the respondent has been served with the debtor's summons, and does not say that it has been served in the prescribed manner. Of course it would be very easy to say in the prescribed manner. I do not think that all those essentials which go to make up a sufficient service as prescribed by the rules should be alleged in the order *nisi*. Supposing I thought it

(a) [1889] 15 V. L.R. 434.

(b) [1876] 2 V. L.R. (L.) 83.

(c) [1862] 1 W. & W. (L.) 172.

to set them out I should think the order *nisi* was
 at I think when it says that he has been served with the
 summons it is sufficient. The debtor's summons is a
 document having special rules as to service, and I think
 ment that it has been served should be taken to mean
 as the rules prescribe, and I do not think that the order
 ad because it fails to state expressly that which I think
 ed in the assertion, though it would be better to adhere
 terms of the Act.

to the substitution of the words "within fourteen days" for
 ds "for the space of," I fail to find any distinction which
 drawn between them. I think that in connection with
 of the order *nisi* they mean the same thing. I do not
 at should vitiate the order *nisi*.

at the other ground, I think that the point is a good one,
 should be reluctantly obliged to yield to that objection
 the matter hereafter mentioned. A man may do
 with the effect of a debtor's summons as a ground of
 cy if he pays the debt, or compounds for it, or
 t, and those three matters must therefore be negatived in
 r *nisi*. The act of insolvency alleged does not in terms
 the debtor has neglected to secure the debt. I should
 at was a good objection, but there is in this order *nisi* a
 at that this debt is wholly unsecured, and I think I may
 the carelessness of the solicitor, and save him from the
 hereof by reason of the accidental inclusion of that
 at. I make the order absolute.

—The errors are due to the omissions of the matters
 to in the 38th section of the Act, and in the form of the
 summons in the schedule to the rules (Form number

aps that is so, but the words of sec. 37 should be

itor for petitioner: *Pitcher*.

itors for respondent: *Snowball & Kauffman*.

A. J. A.

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In re
VANDERBILT.
A'Beckett, J.

1898
August 9.
Hodges, J.

[IN CHAMBERS.]

ESSENDON LAND AND FINANCE ASSOCIATION LIMITED v. K.
(No. 2).

*Practice—Taxation of costs—Party and party—Unsuccessful appeal—Judgment
- Copy order of dismissal—Third copy.*

Where an appeal from a single Judge to the Full Court is dismissed by the respondent may include in his bill of costs, as between party and party, costs of obtaining for himself a copy of the Judge's notes and of obtaining a copy of the order of dismissal.

SUMMONS for review of taxation.

In an action by the Essendon Land and Finance Association Limited against Andrew Kilgour the plaintiff was successful, whereupon the defendant appealed. Before the appeal was prepared by appellant's solicitor the plaintiff obtained a copy of the notes taken by Hood, J., at the trial. One copy of the appeal book, which was printed, was obtained by the respondent from the appellant. The appeal was dismissed with costs (a). Upon taxation of the respondent's costs the taxing officer disallowed certain items and gave his reasons for disallowance:—

Items 3 to 5 inclusive, p. 1.

Attending Mr. Justice Hood's associate, bespeaking copy.

Judge's notes, 6s. 8d.

Attending, obtaining same, 6s. 8d.

Paid therefor, 3l. 3s.

"Disallowed, as it is the duty of the appellant to bring before the Court on appeal the whole of the evidence, oral and written, on which the order appealed from was founded: *per Firth (b)*; vide also 'Rules of Supreme Court 1884, LVIII., r. 11, Order LXVI., rr. 2, 3. The appellant in this case did so accordingly, and the respondent obtained from the appellant one copy of the appeal book under Order LXVI., r. 7.

"Reason of objection to disallowance—That the items made are proper and reasonable, and that it was necessary for the respondent's solicitors to obtain a copy of Mr. Hood's notes in order to properly examine the evidence given.

(a) [1898] 23 V.L.R. 136.

(b) [1881] 19 Ch. D. 419.

Court and to check the exhibits therein referred to, and also to examine and check the notes in the appeal book ; and, further, that the notes so obtained were of great assistance to the Full Court, inasmuch as there were inaccuracies in the notes as copied in the appeal book, as appears by the Judge's notes lodged herewith, and the Judge's notes so obtained were read to the Full Court."

Items 4 and 5. Copy of order dismissing appeal, 2s. As to this item the taxing officer stated: "The respondent claims for three copies of this order. I have allowed him for two copies—one to file, the other to serve—and disallowed the other copy."

*"Reason of objection to disallowance—*That it was necessary and proper to make three copies of the order dismissing the appeal, namely—1. The first copy is the original. 2. The second copy was to lodge as required by the clerk of the Full Court. 3. The third copy was to serve, and was served."

The plaintiff now applied for an order reviewing the taxation.

Cussen for the appellant—The respondent is entitled to obtain a copy of the Judge's notes for the purpose of comparing them with the appeal book. The third copy of the order was for the purpose of being kept.

It was objected on defendant's behalf that, as it was appellant's duty to prepare the whole case, and that as the Judge's notes were in the appeal book, the plaintiff should not be allowed for obtaining the notes independently. It was also contended that the third copy of the order dismissing defendant's appeal was unnecessary.

HODGES, J. The first question I have now to decide is whether it is reasonable or not for a respondent upon appeal to the Full Court to obtain for himself a copy of the Judge's notes, and I cannot say that it is unreasonable. To do so no doubt increases the amount of the costs of the litigation, but in my opinion the respondent in an appeal is entitled to ascertain whether the appellant brings the whole of the case correctly before the ap-

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pellate Court—that is to say, he is entitled to verify the set forth by the appellant in the appeal book. For this I think the respondent is entitled to obtain for himself a copy of the Judge's notes and to charge for it, if successful, in his costs.

With regard to the other question, it appears that the officer has not allowed the respondent the amount charged for a bill of costs for the third copy of the order dismissing the appeal. It is not, in my opinion, unreasonable for a third copy to be made for the purpose of being kept. One copy has to be lodged with the court, another to be served. I therefore allow this charge also. No costs.

Summons for review of taxation allowed.

Solicitors for plaintiff (respondent): *Hodgson & Finlayson.*

Solicitor for defendant (appellant): *John A. Isaacs.*

R.

1898
October 19.

Hodges, J.

[PRACTICE COURT.]

BIGGS v. FITZGIBBON.

Animals Protection Act 1890 (No. 1064), ss. 3, 9—"Cruelty"—Overdriving.

Where overdriving an animal is proved, the effect of secs. 3 and 9 of the *Animals Protection Act 1890* is not to deprive the justices of the power to consider whether there has been cruelty within the meaning of sec. 3. They are therefore to consider the whole circumstances under which the overdriving took place in order to satisfy themselves whether or not there has been cruelty.

ORDER *nisi* to review.

The defendant was charged at the Court of Petty Sessions at Ballarat upon information under the provisions of the *Animals Protection Act 1890* with cruelty to a horse by overdriving it. It appeared that the defendant had driven a party of friends from Ballarat to Skipton, and that on the journey one of the three horses he drove became distressed and was therefore left on the road, where it was discovered next morning. The justices heard the evidence as to the overdriving. Evidence was also given as to the circumstances under which the overdriving took place. In giving their decision the justices

that, having regard to the provisions of secs. 3 and 9 (a) of the *Animals Protection Act* 1890, they were not at liberty to take into consideration the circumstances under which the overdriving took place.

They therefore convicted the defendant.

An order to review this decision was obtained by the defendant on the ground that the justices were wrong in refusing to consider the circumstances in which the overdriving occurred.

Schutt to move the order absolute.

E. P. Wynne to show cause.

HODGES, J. This is an order *nisi* to review the decision of a court of petty sessions at Ballarat. The question I have to decide is as to the meaning to be given to secs. 3 and 9 of the *Animals Protection Act* 1890.

The language of the Act is not as plain as it might be. There is some effort to give a somewhat concise definition to certain words, but I think some of these definitions rather increase than diminish the difficulties of construction. In this case, however, the Act is reasonably free from difficulty. The justices, according to the affidavits, have decided that they could not look at or consider, where there had been cruelty under the Act, the circumstances under which that cruelty occurred at all—that is to say, that sec. 9 made overriding or overdriving in any case cruelty. They saw that the horse was overdriven, and found therefore there was cruelty, and they therefore concluded that they were not entitled to look at sec. 3 and the

(a) *Animals Protection Act* 1890:— working; or Provided

“Sec. 3. The term ‘cruelty’ in this Act shall mean the intentional infliction upon any animal of pain that in its kind or its degree or its object or its circumstances is unreasonable.” that the acts specified in this section shall be deemed to be mentioned by way of example only and shall not be construed to restrict in any way the generality of any prohibition herein

“Sec. 9. The following acts when done to any animal shall be deemed to involve cruelty (that is to say) — contained or to limit the same to cases resembling all or any of the cases specially mentioned.”

(a) overriding overdriving or over-

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definition there given of "cruelty." In my opinion they have looked at this section. There may be overdriving sense—that is, more than a kind person would have driven horses—and yet the justices might say that under the circumstances it was justifiable; for instance, in order to save a man may have to drive his horses far and fast. They might perhaps, in looking into the circumstances of the case, say that the drive was a little distressing to the animal. They might say that a slight strain had been put upon it in order to save suffering to a man or woman. They appear, however, to have disregarded all these surrounding considerations—this was a pleasure party, the straits the party was in, the persons composing the party could do, what opportunity of stopping they had during the drive, so as to judge whether or not there was cruelty.

I therefore make this order absolute with costs, send the case back to the justices to be reheard, with an intimation to them to look at the circumstances under which the cruelty occurred and the horses were overdriven, in order to see whether there was cruelty.

The costs of the previous hearing will abide the event of the rehearing.

Order absolute.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitors for defendant: *Braham & Pirani* (for *L. Ballarat*).

R.

[IN CHAMBERS.]

LONDON BANK OF AUSTRALIA LIMITED v. MURRAY AND OTHERS.

*Practice—Reference to Chief Clerk—Evidence—Document executed subsequently—
“Rules of Supreme Court 1884”—Order LV., r. 67.*

1898
November 8.

Hodges, J.

Where the Chief Clerk is directed by an order of the Court to ascertain more fully the interests of certain persons in certain lands evidence will not be allowed before the Chief Clerk of documents of title executed subsequently to the order of the Court.

SUMMONS IN CHAMBERS.

The London Bank of Australia Limited brought an action against John Murray, Elizabeth Mackay Wyburn, Charles Augustus Cramer Murray, Annie Sutherland Masterton, George Peppin, and William George Cramer, and by order dated 10th August 1898 against William George Cramer and John Murray as trustees of the antenuptial settlement of Elizabeth Mackay Wyburn. One William Sutherland Fraser Murray died on 31st January 1873 intestate, leaving no widow but five children, the eldest of whom, John Murray, became administrator of the estate on 22nd April 1886. After that time, during the years 1890 and 1891, John Murray borrowed for his own purposes 12,000*l.* from the London Chartered Bank of Australia. To secure these moneys there was given on the 12th February 1890 to the latter bank by Annie Sutherland Masterton, Elizabeth Mackay Wyburn, and Charles Augustus Cramer Murray, three other children of the intestate, a guarantee on John Murray's behalf. By this guarantee the three persons giving it jointly and severally undertook, on receiving a request in writing, to repay any amount not exceeding the principal sum of 12,000*l.* which might from time to time be due the bank on the balance of John Murray's current account with interest, and it was agreed that the guarantee should be a continuing one, and should apply to the ultimate balance appearing on the books of the bank as due from John Murray. By a deed of 2nd October 1890 John Murray and the guarantors assigned to the London Chartered Bank certain lands and documents of title as security for the payment by them of their liabilities to the bank, and at the same time they covenanted to execute such further assurances or securities over the premises as the bank might require.

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The London Bank of Australia Limited as successor in right title of the London Chartered Bank of Australia, now sought to enforce the guarantee, the principal amount owing by John Murray being 11,587*l.* with interest, and to declare one John Peppin trustee for the bank of certain lands transferred to John Murray to him in order to obtain a loan. The case was heard before Hodges, J., who gave judgment on 11th November 1897 declaring that Peppin was a trustee of certain land, and that he should transfer; declaring also that the interests of John Murray, E. M. Wyburn, C. A. C. M. and A. S. Masterton in the lands standing in John Murray and George Peppin's names were chargeable for the payment of the debt, and referring to the Chief Clerk to ascertain the interests of those persons in the lands. On 30th May 1898 the Chief Clerk gave his certificate, the portion of which, made known to this report, being that the interest of E. M. Wyburn in the lands was one-fifth, and that this interest was by an antenuptial settlement dated 8th June 1885 settled on trustees, deferred to Mrs. Cramer and John Murray, upon certain trusts for the use of E. M. Wyburn for life for her sole and separate use, independent of her husband, without power of anticipation. On 28th May 1898 an order on further directions was made by Hodges, J., who directed that the Chief Clerk's certificate should be reopened and reviewed, and that *inter alia* the interest of Elizabeth Mackay Wyburn in the lands referred to in the judgment or in the proceeds thereof be "more fully ascertained" and stated after examination of the provisions of the settlement of 8th June 1885. On 10th August 1898 the trustees of Mrs. Wyburn's settlement were added as parties defendant in the action. On 22nd October 1897 and on 9th September 1898 respectively Mrs. Wyburn exercised by deed a power of appointment contained in the settlement. The matter again came before the Chief Clerk for the purpose of determining the interests of Mrs. Wyburn. The deed of 22nd October 1897 was produced in evidence, and it was sought by defendants Cramer and Murray as trustees of E. M. Wyburn's antenuptial settlement, to produce in evidence the deed of appointment dated 9th September 1898. The Chief Clerk marked the document for identification.

adjourned the hearing, and made this note :—" During the proceedings taken herein before me the following point has arisen, and the defendants Murray and Cramer, trustees of Mrs. E. M. Wyburn's settlement, desiring to take the opinion of the Judge thereon, I have for that purpose adjourned to a day to be fixed :—Whether the document marked for identification only (exhibit W 2) is admissible in evidence on the reconsideration of the certificate herein referred back to the Chief Clerk by order on further consideration herein."

The defendant trustees took out a summons to determine whether the deed of 9th September 1898 was admissible in evidence.

Hayes for the trustees—The reference to the Chief Clerk was "to more fully ascertain the interest." No time was mentioned. The inquiry is as to what interest the plaintiff can seize.

Higgins for the plaintiff—The order of the 28th June referred only to matters then existing. The exercise of the power of appointment in September 1898 in no way affects the rights of the plaintiff as a secured creditor. The meaning of the reference is, that the Chief Clerk, having regard to the evidence before him, has to state more fully Mrs. Wyburn's interest. This deed is not within the limits of the reference.

Hayes in reply—It is a mere question of the weight of evidence. The interest is to be ascertained at the date of the certificate when the Chief Clerk answers the inquiry.

Counsel referred to Order LV., r. 67, and on the question of costs to *Upton v. Brown* (a); *In re Watts, Smith & Watts* (b).

HODGES, J. This summons asks me to determine whether a deed of appointment, dated 9th September 1898, was admissible in evidence in proceedings before the Chief Clerk. Judgment in the action was given by me on 8th November 1897. The Chief Clerk made in May 1898 his certificate as to the state of the title. In June 1898 the Court was asked to refer back that certificate to the Chief Clerk, in order that he might state more fully the interests of the defendants Elizabeth Mackay Wyburn

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(a) [1882] 20 Ch. D. 731.

(b) [1882] 22 Ch. D. 1.

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and Annie Sutherland Masterton in the lands referred to in the judgment, or the proceeds thereof, and make that statement after statement of the provisions of the settlement.

The question is, I think, to what date does that order refer? What is the time with regard to which the Chief Clerk has fixed the condition of the title which he has to determine? In my opinion it cannot come later than the date of the order asking him to do it. I think that order, dated 28th June 1898, does not direct the Chief Clerk to state more fully what title these individuals may have at some future time, but it asks at the latest (even if it be as late as that) to state more fully the title of these persons at the date of the order. I think more probably the correct date is that of the earlier certificate; at any rate it does not go later than the time of the order made in June 1898. That being so, any document executed after that time would not, in my opinion, be evidence of what the Chief Clerk is asked to find under the order. Therefore the Chief Clerk is right in rejecting the deed of 9th September 1898, an instrument executed not only long after the date of the judgment, but long after that of the order directing the Chief Clerk to ascertain the title of these persons—that is to say, the deed was executed after that order directing him to state more fully was made. Therefore the Chief Clerk had to proceed as if the title had been ascertained at the date of that order. This is clear, because after stating the title sufficiently fully, no doubt, for certain purposes, the language used in the order was “more fully ascertained and stated.” And the matter was sent back really in order that he might again look at these documents, so as to express more fully the title of the persons referred to. I shall therefore express my opinion upon the matter of this reference in the manner indicated. I direct the costs to be costs in the cause, because I think the question raised by this summons one of great moment, and so far as the defendants are concerned they were entitled to be heard upon it.

Solicitors for plaintiff: *Attenborough, Nunn & Smith.*

Solicitor for the defendants Cramer and Murray: *Wyburn.*

Solicitor for other defendants: *J. M. Smith & Emmerton.*

R. H. C.

L. STEVENSON AND SONS LIMITED v. HARTLE.

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November 15.

Practice — Supreme Court — County Court — Jurisdiction — Foreign procedure — Liquidated demand — Service in Western Australia — Costs — “ Rules of Supreme Court 1884 ” — Order LXV.; r. 12 — County Court Act 1890 (No. 1,078), ss. 61, 64, Part V. — Intercolonial Debts Act 1887.

In an action for a liquidated demand claiming an amount under 50*l.* a writ for service out of the jurisdiction was served on the defendant in Western Australia, and on the defendant's neglect to appear, judgment was signed against him for default of appearance. An order was obtained for leave to proceed in the action, and that the Prothonotary fix the amount of the judgment. The Prothonotary fixed such amount, but refused to tax costs on the Supreme Court scale.

Held, that the provisions of Order LXV., r. 12, applied, and that a Judge had a discretion to allow costs upon the Supreme Court scale.

Held also, that the words of sec. 138 of the *County Court Act 1890* refer to process in aid of a judgment or of execution upon a judgment issued out of the local courts of the province and not issued out of Victorian Courts.

Held also, *per WILLIAMS and HOLROYD, JJ.*, that the plaintiff summons referred to by sec. 139 of the *County Court Act* for service out of the jurisdiction is one under the provisions of either sec. 61 or sec. 64.

Sed, per HOOD, J. Such summons should be issued under sec. 61, modified by the requirements of Part V. of the Act.

APPLICATION in Chambers referred to the Full Court by Holroyd, J.

L. Stevenson and Sons Limited, a company carrying on business in Melbourne, issued a writ, for service in Western Australia, against Thomas Hartle, to recover the sum of 15*l.* for goods sold and delivered. The writ was served on Hartle in Western Australia on 24th December 1897. No appearance to the action was entered within the time limited, and judgment was signed for default of appearance. The plaintiff then obtained an order for leave to proceed in the action, and that the Prothonotary should ascertain the amount for which judgment was to be entered. He also obtained an order for taxation of his costs. The Prothonotary fixed the amount payable by the defendant, but refused to tax the costs on the Supreme Court scale.

Holroyd, J., to whom the plaintiff applied in the matter, referred it to the Full Court.

Herbert Barrett for the plaintiff—Costs on the Supreme Court scale have been granted by Holroyd, J., in *Le Page v.*

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Jackson (a), and by A'Beckett, J., in another unreported case ; but Hood, J., declined to make an order in *Wilkinson v. Currie (b)*. The County Court Judges have held that, as no Order in Council has been made directing that the *Intercolonial Debts Act*, incorporated as Part V. of the *County Court Act* 1890, should apply to Western Australia, and as the procedure under sec. 141 is inconsistent with sec. 64, they have no power to act under sec. 141 : *Harris v. Thomson (c)*. The only way in which action can be taken in the County Court for goods sold and delivered is under sec. 64. Sec. 139 says—"Any summons issued under the authority of this Act." Sec. 64 requires an appearance within ten days. Sec. 138 controls sec. 139. The intention of the *Intercolonial Debts Act* was not to extend the jurisdiction of the County Court, but to reciprocate with the local courts of other colonies.

WILLIAMS, J. This is a matter referred to the Full Court by my brother Holroyd. One of the questions involved in it for our consideration is whether the decision of my brother Hood in *Wilkinson v. Currie (d)* is correct. We think it is. By sec. 139 of the *County Court Act* 1890 it appears that a summons may be issued for service out of the jurisdiction. Now what summons may be issued for service out of the jurisdiction ? That is answered by the words "any summons issued under the authority of this Act." That is to say, under sec. 61, or, if not, under sec. 64. Speaking for myself upon this point, I think the Act refers to sec. 64, because sec. 139 says, "any summons issued under the authority of this Act for a debt or liquidated demand in money," and sec. 64 has reference to a summons of that very nature. It runs thus :—"The following provisions shall apply to any action in a County Court brought to recover a debt or liquidated demand only." And therefore I should say that the summons contemplated by sec. 139, and to be issued out of the jurisdiction, is that mentioned in sec. 64. But I do not hold strong views upon that point. It is said by Mr. Barrett that to hold this is to lay down a practice which is unworkable, because

(a) [1897] Unreported.

(b) [1898] 24 V.L.R. 65.

(c) 3 *Argus* L.R. (C.N.) 41.

(d) 24 V.L.R. 65.

the section gives only ten clear days within which a defendant may give notice of his intention to defend, and if he fail to give such notice final judgment may be entered against him. But the answer to that is that once you get a summons which can be issued out of the jurisdiction—let it be *argumenti gratia* a summons under sec. 64—the proper procedure then is to resort to sec. 141 and get the Judge to fix a return day for the summons issued under sec. 139. Both sections run together except in so far as sec. 141 is inconsistent with the provisions of sec. 64 as to the time allowed for entering an appearance, and sec. 141 prevails *quod* such time. Therefore the latter section, modified with the particular portion of sec. 64, prevails. This disposes of the first point.

In the second place it is said that sec. 138 controls sec. 139, and that as there is no Order in Council declaring that the provisions of this part of the Act apply to Western Australia, neither sec. 139 nor sec. 141 applies to Western Australia, and therefore this process cannot be made use of. The answer to that contention is in our opinion this, that sec. 138 has no reference to sec. 139. The words of sec. 138 are—"If in any province there be any law in force by which effect may be given by the local courts of such province to the judgments of the county courts of Victoria the Governor may by Order in Council declare that the provisions of this Part of this Act shall apply to the judgments of the local courts of such province." Stopping at these words, it simply means reciprocity of judgments. If the local courts of Western Australia or of any other province have a law by which effect is given to our law, then the Order in Council gives reciprocity. That is to say, the provisions of this Part of the Act then apply to the local courts of Western Australia and of any other province.

I quite agree with the comment passed by my brother Holroyd upon these words—viz., that they refer to process in aid of judgment or of execution upon a judgment. But even if these words do not bear that meaning—I think they ought to bear it—they relate only to process issued out of the local courts of the provinces, not to process issued out of Victorian courts. As was pointed out in argument, it appears that in this Act secs. 139,

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142, and 143, and perhaps secs. 144 and 145, have all to do together, while secs. 140 and 141 appear to relate to a different subject matter.

We answer the reference thus: That Order LXV., r. 1, applies to this matter, and that the learned Judge who heard the application had a discretion.

HOLROYD, J. I wish to add that it seems to be immaterial so long as a summons is issued and is shaped in proper form whether it is under sec. 61 or under sec. 64, and therefore I do not wish to give any positive opinion as to the section under which it should issue. I think it cannot make the slightest difference under which section the summons is issued. It is all to the same thing even in form. As regards the present case, I referred the whole matter to the Full Court, which will therefore exercise its discretion upon it.

HOOD, J. I desire to add a word, because I do not agree with everything said by my brother Williams with regard to the meaning to be placed upon sec. 64. Under the *Court Statute* 1869 (No. 345) only a plaint summons for service within the jurisdiction could be issued, but another summons for service within the jurisdiction was created by sec. 7 of the *Administration of Justice Act* (now sec. 64 of the *Court Act*), so that there were, previous to the *Intercounty Debts Act* 1887, two classes of summons for service within the jurisdiction. Then sec. 4 of the last-mentioned Act (now sec. 4 of the *County Court Act*) referred to a new class of summons for service out of the jurisdiction, and I think that the summonses are the general ones mentioned in sec. 61, and a special mode of service is provided for these.

Barrett—I ask the Court to grant costs in this matter on the Supreme Court scale.

[HOLROYD, J. What evidence was there before me in the Court below that the County Court Judge was ever asked to fix the return day?]

There was no application. It was, however, well known that all the Judges refused to do so, and therefore in the

present application was made. In *Adams v. Jones* (e) d, J., allowed as matter of discretion costs on the Supreme scale. Up to that time the County Court Judges had l. *OOD, J.* A *mandamus* would have settled the question.] application for a *mandamus* was made to your Honor, and anted, but not proceeded with. I do not ask for costs of ference.

R CURIAM. We grant costs in this case upon the Supreme scale.
 icitors for plaintiff: *Goldsmith & Sharp.*

R. H. C.

[INSOLVENCY JURISDICTION.]

IN RE CHARLES HENRY JAMES.

cy—Certificate of discharge—Death of insolvent—Jurisdiction—Insolvency
 1890 (No. 1102), ss. 130, 138, 9—*Insolvency Act 1897* (No. 1513), s. 9.

Court of Insolvency has no jurisdiction to hear an application for a te of discharge where the insolvent has died, notwithstanding that the ion for such certificate was begun during the insolvent's lifetime.

ECIAL case under sec. 9 of the *Insolvency Act 1897* :—

By order *nisi*, under sec. 39 of the *Insolvency Act 1890*, the 28th day of April 1897, and by subsequent order te thereon under sec. 47 of the said Act, the estate of the Charles Henry James was adjudged to be sequestrated for nefit of his creditors.

Leave, under sec. 144 of the *Insolvency Act 1890*, to for a certificate of discharge under Part VIII. of the *Insolvency Act 1890* and Part VII. of the *Insolvency Act 1897* ranted to said Charles Henry James by the Court of ency at Melbourne on the 8th day of August 1898.

Mr. Duffy, of counsel for said Charles Henry James, d, on 30th September 1898, for a certificate as aforesaid, r an order dispensing with the condition imposed by sec. the *Insolvency Act 1890*, and also asked for an order dis-

(e) [1896] Unreported.

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pensing with attendance of Charles Henry James, ground of his then moribund condition.

"4. Mr. Braham appeared on behalf of all the (except John Haines, who did not appear) and on behalf trustee, and asked for an adjournment for a fortnight, i that the insolvent might be present and examined by the and creditors on the certificate application, undertaking in the meantime it appeared that the said Charles Henry could not attend, and could not be examined, he would further objection.

"5. Thereupon the Court adjourned the application certificate and dispensation for fourteen days, that is un October 1898.

"6. The said Charles Henry James died on the 2nd 1898.

"7. An affidavit was, on the 12th October 1898, file court on behalf of insolvent, setting out the death Charles Henry James, and that the widow of said Henry James, and executrix of his will, the other execu having elected to act as executors, desired the applicatio proceeded with, and setting out the service of notice o tion to proceed as if said Charles Henry James were al copy of this affidavit is annexed hereto. A further a was filed setting out service of the like notices on creditors.

"8. On the 14th October 1898 counsel appeared said adjournment and proceeded with and continue application as aforesaid, and read the said affidavits. Th no other appearance, neither trustee nor any creditor ap either personally or by counsel or by attorney.

"9. The Court stated that the view of the Court th that the death of the said Charles Henry James put an such application finally, and that such application could proceeded with, continued, heard, or granted.

"10. At the instance and at the request of c appearing as if the insolvent were alive, and also appea instructed by the executrix, the Court consented to trans following question of law by way of special case f

determination of the Supreme Court:—Has the Court of Insolvency jurisdiction or power to proceed with the hearing of, and to hear and to grant such application, in view of the death of said Charles Henry James? If yea, in what form, and on whose application?"

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Duffy to move—The Court of Insolvency has power to hear and to grant an application for a certificate of discharge, even although the insolvent is dead: Sec. 130 of the *Insolvency Act* 1890. This is a matter which may be "proceeded in" under that section. The certificate has the effect of freeing the insolvent and his representatives ever after from his debts. It is a reciprocal benefit. Assuming that the insolvent had made a certain conveyance, and after that the insolvency had occurred and the insolvent had done everything necessary to obtain his certificate, if then some person desired to impeach the conveyance under 13 Eliz., c. 5, the grant of a certificate would mean that no claim could be brought because this particular debt was satisfied. The creditor would have no *locus standi*. The certificate makes the representative free. The issue of the certificate blots out existing debts.

[HOOD, J. They cannot be enforced, but they still exist: See *Kirkpatrick v. Tattersall* (a).]

The debtor is discharged.

[HOOD, J. *In re Scallan* (b) is against your view.]

The Court may order judgment to be entered, even though the debtor be dead, *nunc pro tunc*. The Legislature has gone beyond the personal liability of an insolvent. The Act deals with his estate. Sec. 35 enables a person who has the insolvent estate to surrender it, and all the like proceedings may then be taken. It is the estate which is regarded whether the person be living or dead. There is, however, still left the position of a person who was alive when proceedings for a certificate were first instituted, but who died during the proceedings. The Act does not touch this case.

[HOLROYD, J. It used to be a necessary preliminary to the granting of a certificate that the insolvent should be examined.

(a) [1845] 13 M. & W. 766.

(b) [1876] 2 V.L.R. (I.P. & M.) 2, at p. 8.

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He may still be examined. A dead man cannot be examined. Any creditor has the right to ask for an examination.]

The Judge who hears the application for a certificate is always at liberty to grant the insolvent leave not to appear.

[HOOD, J. If a man died immediately after sequestration, whom can the certificate be granted?]

Sec. 42 enables the Court to declare a dead man insolvent. This power was considered in *Ex parte Sharp, in re Ward*.

[HOLROYD, J. A conditional certificate may be granted to an insolvent—for example, as to the disposal of after-acquired property: *Insolvency Act* 1890, sec. 143. Sec. 95 of the *Insolvency Act* 1897 (No. 1513), provides that even though the conditions of a conditional certificate be not complied with the Court may grant an absolute discharge. If the insolvent's failure to comply arises from his death may his executors then apply for an absolute certificate of discharge?]

There are numerous inapplicable provisions of the *Insolvency Act* referred to *Bromley v. Goodere* (d); 4 Ann. Cas. 19, 20. The insolvent before his death had filed an affidavit in this matter. The decision in *In re Scallan* referred to means meaning to be placed upon the words "on his behalf" in sec. 131 of the Act. Molesworth, J., thought that they referred to someone acting for an insolvent while he was alive. The Court of Insolvency has power to hear an application of this sort and to antedate the certificate. If delay in applying has resulted through the act of the party, the Court will not assist him if the Court has reserved its decision or has adjourned it.

Counsel referred during argument to *Re Neale*, *Neale* (e); *Evans v. Rees* (f); *Moor v. Roberts* (g); *Sherman's Laws of Bankruptcy* (3rd ed.), p. 598.

There was no appearance for the trustee or for any creditor.

WILLIAMS, J. This is a special case stated by the Judge of the Court of Insolvency in reference to an application by Charles Henry James, an insolvent, for a certificate of discharge.

(c) [1886] 34 W.R. 550.

(d) [1743] 1 Atk. 75, at p. 77, per Lord Hardwicke.

(e) [1851] Fonblanque B.R.

(f) [1840] 12 A. & E. 167.

(g) [1858] 3 C.B. N.S. 844.

It appears that Mr. Duffy, of counsel who appeared on behalf of insolvent, made an application to the Court of Insolvency at Melbourne on 30th September of this year for a certificate of discharge, and for an order dispensing with the condition required by sec. 39 of the *Insolvency Act* 1890. He also applied for an order dispensing with the attendance of the insolvent for examination. That application was opposed by the creditors and by the trustee of the insolvent's estate. It was upon the hearing of the application proposed that an adjournment for fourteen days should take place, in order that insolvent might be present, if in a condition to be present. That adjournment was granted, and the Court of Insolvency adjourned for a fortnight. During the course of that fortnight insolvent died—viz., on 2nd October. On the 14th October counsel again appeared, and renewed the application for a certificate. The learned Judge of the Court of Insolvency held that the death of Charles Henry James virtually put an end to the application, and it could not therefore be entertained.

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The question we have now to determine is—Was the learned Judge right? We think he was. The application is based upon two grounds. As I understand counsel's first argument is this:—Sec. 130 of the *Insolvency Act* provides that "if an insolvent shall die after sequestration under Part III. or adjudication of sequestration the sequestration shall after notice has been given to such persons (if any) as the Court may think fit be proceeded in as if such insolvent were living."

It is contended that this application is a matter which can be proceeded with under that section even after the death of the insolvent. We think, however, that this section does not cover an application of this kind—that it is meant simply to effect this: if the insolvent dies after sequestration, the sequestration may be proceeded with as if the insolvent were living—that is to say, any matter in connection with the insolvent estate may be carried on for the purpose of getting in and disposing of the estate. We think that this is the entire scope of that section. If that be so, it does not cover an application of this kind. This application for a certificate appears to us to be a personal matter. The effect of a certificate

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is to discharge an insolvent from his debts. All his estate is gone away from him, and has been vested in his trustee. The certificate does not therefore affect his estate. It discharges him from his debts—from his debts proved in the certificate. It discharges him from his debts—proven in insolvency. Probably its effect would also be to protect his acquired property—acquired, that is to say, after the certificate is obtained.

Counsel also contends that, assuming his first contention to be wrong, the Court of Insolvency has power to grant an application for a certificate in a case of this kind *nunc pro tunc*. He bases this contention upon a certain English case. In that case it appears that the person who made the application *pro tunc* was entitled to a certain thing—for instance, to sign judgment within a certain time. By the act of the Court as it is expressly stated in the report, he was prevented from signing or entering his judgment within the time required. The Court then said that, as he had a right to it, and he had not signed and entered his judgment but for the fact that he was prevented by the act of the Court, it would exercise its jurisdiction and give him the right to have that done *pro tunc*. Between that case and the one now before the Court, the distinction is obvious. Here the insolvent neither had the right to a certificate when he made the application, nor was he prevented from exercising that right by anything done by the Court. His personal attendance is necessary before he can obtain his certificate. That is to say, any creditor has the right to appear, may, if he wishes, examine the insolvent. The insolvent was therefore, was not in a position to require a certificate to be granted to him as a matter of right when he made the application for it. He was not prevented from making his application by any act of the Court.

We answer the question of the special case thus: The learned Judge had no jurisdiction to proceed with the application of and to grant the application.

Solicitor for the applicant : *J. E. Dixon.*

R. H.

[IN CHAMBERS].

BLACK v. WILSON.

1888

November 22.

Madden, O.J.

Interrogatories—Further and better answers—Payment of deposit—Waiver—“Rules of Supreme Court 1884”—Order XXXI., rr. 11, 25, 26—Order LXIV., r. 7.

Where a party interrogated delivers his answers he cannot on a summons for further and better answers object that the other party has failed to pay the full sum required as a deposit under Order XXXI., r. 26.

SUMMONS in Chambers under Order XXXI., r. 11, for further and better answers to interrogatories. The facts may be presently collected from the argument and judgment.

Ample in support.

Deagher to oppose—There is a preliminary objection. The defendant has not paid the full sum required by Order XXXI., r. 26, to be paid into Court. He must do this before he can deliver further answers: *Gunn v. Pierce (a)*. The plaintiff's neglect in answering does not amount to a waiver. The rule is not framed for the benefit of the interrogated party, but for the public generally, therefore it cannot be waived: *Enders v. Eder (b)*. The plaintiff had not, when he delivered his answers, any knowledge of the irregularity. The English courts put the matter as one of jurisdiction and not of procedure: *Eder & Co. v. Attenborough (c)*; *Aste v. Stumore (d)*. The summons be allowed to go on the plaintiff is in a worse position than if he had refused to answer at all. The time for answering runs from the time the full sum is paid into Court. When the defendant pays the money in full the plaintiff may be allowed to put in a full set of answers. More than one set of interrogatories may be allowed: Order XXXI., r. 7. Counsel referred to *Young v. Turner (e)*.

Ample contra was not heard.

[1889] 11 A.L.T. 40.

(d) [1883] 13 Q.B.D. 326.

[1885] 11 V.L.R. 827.

(e) [1892] 18 V.L.R. 460.

[1889] 23 Q.B.D. 130.

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v.
WILSON.Madden, C.J.

MADDEN, C.J. The contention of the plaintiff appears to be this: that, having once answered, the defendant compels him to answer rightly, because at the time the interrogatories were obtained the defendant failed to pay the amount required by Order XXXI., r. 26, into Court. Money is paid to indemnify the party interrogated against the costs of the interrogatories. If the plaintiff had refrained from answering at all it would have been made plain to the defendant that the amount paid in was insufficient. Now, if a condition be for the benefit of a party, that party may waive it by the method by which it is suggested that the present difficulty may be met is the worst one that can be applied, because it does not mean that the Court should treat the answers already made as if they had never been made. Until the money required to satisfy the person interrogated need not deliver any answer at all, he may remain perfectly silent. But I think that, as this rule is prescribed by the rule, if he chooses to answer he must do so according to the ordinary conditions attaching to answers. Whether the proper amount of money be paid into Court or not, of deposit or not. If, therefore, the answers are defective, the defendant cannot refuse to supply the defects merely upon the ground that he was entitled never to have answered. He has, in my opinion, waived his right to be silent. If he could now insist upon his objection, as he contends he can, the result would be to deprive the opposite party of his right to interrogate. But it is not for me that I have no discretion under the rules to permit the defendant to pay *nunc pro tunc* the proper amount into Court. A small amount has been paid into Court to abide the costs of the interrogated party. In my opinion I have no discretion and may now order the proper amount to be paid *nunc pro tunc* under Order LXIV., r. 7, which allows a judge to alter the time for doing any act. The whole matter, I think, may be set right by ordering the balance of the proper amount to be paid into Court forthwith. The plaintiff may, I think, proceed with the summons.

*Objection disallowed.*Solicitor for plaintiff: *Upton.*Solicitor for defendant: *J. Woolf.*

R. I.

[IN CHAMBERS.]

IN RE ISAAC LAZARUS. THE TRUSTEES EXECUTORS AND AGENCY
CO. v. LEVY AND OTHERS.

1898
November 3, 23.

Madden, C.J.

Will—Construction—Executor—Tenant for life—Remainderman—Furniture—Heirloom—Indemnity—Danger—Intricate will—Costs.

The Court has no power to order a tenant for life of furniture and other household chattels to provide security, or to indemnify the executor against loss of the furniture and chattels, provided the said furniture and chattels are not in instant danger.

ORIGINATING SUMMONS.

By his last will and testament, bearing date 14th May 1884, Isaac Lazarus bequeathed to his wife certain personal effects, including furniture in and about his dwelling-house in Clarendon-street, East Melbourne, at the time of his death, or in any other dwelling-house which at that time should be his principal place of residence, "for her use during her life and widowhood with power to her to sell any article of furniture or for household adornment not immediately required by her but only on condition that she either replaces such articles as nearly as she can do or else replaces in substitution therefor the actual market or selling value . . . as nearly as it can be appraised." The rest of the estate, real and personal, was devised and bequeathed to the Trustees Executors and Agency Co. Limited upon certain trusts, and as to certain property situate in Chapel-street, Prahran, "upon trust to permit my wife so long as she shall remain my widow to receive during her life the rents issues and profits arising therefrom upon the express condition that she keeps and maintains thereout my three youngest sons . . . until they shall each attain the age of twenty-one years and when they shall have attained that age then each of my said sons shall receive the sum of 250*l.* out of my wife's estate and I hereby declare that the said sums or payments shall be respectively a charge . . . upon her income and upon the death of any one or more of my said sons then his or their share shall devolve upon the survivors or survivor of them in equal shares and in the event of the death of all my said sons then their several shares shall go to . . . my said wife when the said charge

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or charge shall be merged or satisfied. And I do hereby and declare that after the decease of my said wife the whole of the dividends and income hereinbefore bequeathed and to be paid to my said wife shall thereupon devolve upon her and shall be divisible between and amongst my three daughters, Hannah, Kathleen and Caroline or the survivor or survivors of them in equal shares or if only one then all to her during her life or her lives or life subject nevertheless to the express trusts as to maintenance during their minority of my sons, Lazarus, Edward Percy Lazarus and Henry Lewis Lazarus hereinbefore declared and hereinbefore imposed upon my said wife and subject to all other (if any) trusts contained in the same."

By a codicil dated 10th June 1887 the provision as to the payment of 250*l.* was revoked, and another provision was substituted. Isaac Lazarus died on 6th August 1887, and probate of the will and codicil was on the 1st September 1887 granted to the Trustees Executors and Agency Co. Limited, the executors appointed by the will. The testator left him surviving a widow, Lucie Ahrenfeld Lazarus, and seven children, three sons, Aaron Mark, Henry Lewis, Jacques, and Edward, the two latter being under age. One of the daughters, Kathleen, had since died intestate, and administration of her estate had been granted to her brother, Aaron Mark Lazarus. Kathleen's daughter, was now Kathleen Levy. After the testator's death the widow continued for some time to reside in the house in Clarendon street, East Melbourne, formerly occupied by him as tenant, and continued in possession of the furniture and other chattels bequeathed to her for life by the will. In September 1897 in March 1898 the rent of the house fell into arrear, and in order to save the furniture from distraint, the Trustees Company paid the rents due. At the time this money was paid to the landlord, viz., in March 1895, the Trustees Company obtained from Mrs. Lazarus an inventory. The company demanded some security for the due preservation from seizure of the furniture and other chattels. This Mrs. Lazarus refused to give. In June 1897 the widow conveyed to one Ellison all her interest in the estate as security

repayment of an advance of 100*l.* and interest thereon at 20 per cent. This assignment was subsequently cancelled, the indebtedness having been paid off. On 8th July 1897 she executed a contract of sale and a contract of letting and hiring over a piano, part of the furniture bequeathed, to one Albert Coppell, to secure the repayment of a loan of 20*l.* On 28th July 1898 she executed a bill of sale to one Samuel Davis over the piano to secure repayment of 20*l.* and further advances. In the same month she assigned her interest in the estate to the Australian Mont de Piete. The Trustees Company, on 9th May 1898, requested Mrs. Lazarus to consent to a sale of the furniture held by her under the terms of the will. She refused to give the required consent. The company thereupon issued an originating summons for the determination of the following questions :—

1. What is the duty and what are the rights of the plaintiff company and of the defendant Lucie Ahrenfeld Lazarus, the widow of the testator, with regard to the furniture and other domestic chattels bequeathed to the said defendant during widowhood ?

2. Who are entitled to share in the residuary estate, and in what proportion and subject to what (if any) trusts ?

3. And for such declaration and directions as may be necessary or proper under the circumstances appearing in the affidavits to be used in support of this application.

The summons now came on for hearing.

Higgins for the plaintiff—The principal question is, what is the executor to do with regard to the furniture in which the widow has a life interest ? It is in danger. The rule as to heirlooms, such as pictures and other movable property, applies, and if there is danger the Court will order security to be given : *Foley v. Burnell* (a), followed in *Conduitt v. Soane* (b), where the giving of an inventory and signing an undertaking was held sufficient in the absence of danger.

[MADDEN, C.J. Heirlooms are distinguishable from furniture.]

(a) [1783] 1 Bro. C.C. 274, at p 279. (b) [1844] 1 Coll. C.C. 285.

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Schutt for the defendant Kathleen Levy—The old practice of the Court of Chancery was to protect remaindermen against the life-tenant where personal property was bequeathed.

[MADDEN, C.J. The sole value of furniture is to have it in the house. An heirloom may be left with the trustee. If this life-tenant cannot give security she will be deprived of the enjoyment of the furniture.]

It may be sold. The danger has arisen through her fault.

[MADDEN, C.J. I must assume that the testator knew that the house taken by his widow would be leased.]

The rule applies in the case of all personal chattels : *Williams on Executors* (7th ed.), p. 1396.

[MADDEN, C. J. A sale would realize merely a trifle. Have you an authority for suggesting a sale ?]

No !

[*Higgins*—Wasting property should be sold in order that the intention as to the remaindermen be not defeated.]

As to the second question—The three daughters are entitled to the residuary estate, real and personal, and their estate is not encumbered by any trust.

Meagher for the defendant Caroline Lazarus—By leaving the furniture with the life-tenant the testator's intention will be defeated. The trusts as to maintenance are only impressed on the real estate.

Counsel referred to *Seton on Decrees* (5th ed.), Form 9, p. 1476 ; *Clark v. Ormond* (c).

Higgins in reply referred to *Howe v. Dartmouth* (d).

There was no appearance for Mrs. Lazarus.

Cur. adv. vult.

MADDEN, C.J. This is an originating summons in which the Court is asked to restrain in some way the operations of a lady, the widow of the deceased, who was entitled under the provisions of her husband's will to a life interest in certain

(c) [1870] Jac. C.C. 108, at pp. 123, 124. (d) 2 White & Tudor L.C. (6th ed.), pp. 330-334.

furniture in his late residence. The furniture was in a rented house, and according to the trustees' statement there was a danger that it would be liable to be seized under distress for rent. It appeared that on a former occasion the trustees were obliged to pay the rent of the house in which the widow lived in order to save the furniture, and now, though there was no immediate danger of seizure, they fear that the same thing might at any time occur again, and they allege that in order to preserve it I should order the life-tenant to give security for her proper use of it. I think this is a hard measure. If I made such an order I should practically be taking the furniture from her, because it is clear she cannot find security. I have, however, considered the powers of the Court with regard to this matter, and what I should do under these powers. As far as I can gather, the authorities upon this point appear to show that where a life interest in chattels is given to a beneficiary by will, unless these chattels are heirlooms, in which case the rule is different, it appears that under the modern practice nothing more is required from the life-tenant than an inventory of the chattels. *Lewin on Trusts* (9th ed.), p. 769, states:—"In a bequest to a person of the use of *household goods* it seems the legatee may use them in his own or in any other person's house and either alone or promiscuously with other goods, or, it is said, may let them out to hire; but where the chattels are *heirlooms annexed to a house* and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire except together with the house itself. Of course the use of the chattels by the tenant for life does not enable him to *pawn* them beyond the extent of his own interest."

And the learned author cites, in support of that proposition, *Marshall v. Blew* (e). In that case there was a devise from the husband to the wife of the use of all household goods, etc., for life or widowhood, afterwards to children and grandchildren. It was held by Lord Hardwicke that the wife could, under this devise, "use the goods in her own or any other person's house, alone or promiscuously with other goods, or may let them out to hire."

(e) [1741] 2 Atk. 217.

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If the life-tenant is entitled to use the furniture, then she has the right included of putting the furniture in the house she rents. And if she does so the furniture is not liable to distress under the powers given to landlords. The powers include an absolute right, if the rent be not paid, to distrain upon all goods upon the demised premises belonging to anyone. I do not think, therefore, that I have any objection to do what is here asked—to demand security for the furniture from this life-tenant. The case of *Foley v. Burrell* is suggested as an authority in favour of the trustees' request. In that case the Lord Chancellor says:—"The cases as to security for life giving security for the goods have been overruled. The Court now demands only an inventory, which is not a matter of justice, as there ought to be danger in order to require security." "There ought to be danger" is the phrase used by His Lordship in the judgment, and it is upon these very dangers that the present application is based. In my opinion such a phrase has no reference to immediate and instant danger to the goods, but as in the present case to a possibility merely of the rent falling into arrears. I doubt very much that the case is an authority as to the power of the Court; but as I have already said, in order that the life-tenant should find security would be the effect of depriving her of her life estate. Neither as a matter of law nor in the exercise of common fairness do the trustees should interfere in the manner asked, and so deprive her of what the testator intended she should have for her life.

Another question is asked by the summons. (I have not read it.) The testator's will is intricate, and to some extent incoherent and difficult of construction. But for the purpose of answering this question the property in the Prahran is the only matter to be regarded. The scheme of the will was to leave that property to the testator's widow for life, subject to the obligation of maintaining certain of the children and sons. On the death of the widow the will provided that the life estate was to pass to the testator's three daughters, nevertheless to the express condition as to the maintenance of the children during their minority of my sons" . . . "and

(f) 1 Bro. C.C. 274, at p. 278.

all other (if any) trusts as are respectively herein declared and directed of and concerning the same."

I think it is quite clear that the only trusts "concerning the same" are in respect of this land and house at Prahran, and the only trust as to them is the maintenance of the three boys. Originally the property was charged with the payment of 250*l.* for each of the children, but by a codicil this provision was revoked and another substituted for it. I think that the persons who are entitled to share in this property are the daughters Kathleen and Caroline and the representative of Hannah, who has since died, and these persons take the property subject to the trust for maintenance and education of the three sons already declared in the devise to the widow. Of course this trust for maintenance and education is modified by the provisions of the codicil.

I therefore answer the questions asked in the summons thus—

(1.) The defendant is entitled to retain the possession of the furniture and other domestic chattels without security.

(2.) The daughters Kathleen and Caroline and the representative of the deceased daughter Hannah are entitled to share equally in the residuary estate, subject to the trust for maintenance and education of the three younger sons.

I do not know that any directions are necessary, seeing that the question is answered in the manner I have stated. The rest will take care of itself.

Costs of all parties will be paid out of the estate. It is a will which necessarily would give much trouble in construction, and therefore I think the summons was warrantable. Costs of the trustees as between solicitor and client.

Solicitor for the plaintiff: *J. Woolf.*

Solicitor for Caroline Lazarus: *Mornane.*

Solicitor for Kathleen Lazarus: *Lazarus.*

R. H. C.

1898

In re
LAZARUS.

Madden, C.J.

1898
November 30.

Madden, C.J.

[PRACTICE COURT.]

WHITNEY v. WILSON.

Police Offences Acts 1890 (No. 1126), s. 40 (1); 1891 (No. 1241), s. 11.
—Admissibility—Insufficient lawful means of support—Other offences.

Upon the hearing of a charge under sec. 40 (1) of the *Police Offences Act* that "the defendant was a person having insufficient lawful means and was therefore deemed to be an idle and disorderly person in accordance with the Act, evidence will not be permitted to show that the defendant was guilty of larceny or had been the associate of thieves, or was himself a disorderly person.

ORDER TO REVIEW.

The defendant Wilson was charged upon information under sec. 40 (1) of the *Police Offences Act* 1890 with being a person having insufficient lawful means of support, and that he was deemed to be an idle and disorderly person. At the hearing before the Court of Petty Sessions at Melbourne evidence was given by one Trevena that on 23rd September 1898 he saw the defendant picking a lady's pocket. A witness, on cross-examination, stated that he knew nothing whatever about the prisoner's means of support. Evidence was also given that the defendant was associated with thieves and had not done any honest work for a long period. No evidence was given by the prosecution as to the defendant's lawful means of support, but evidence was adduced on the defendant's behalf that he had been, during the period from 19th September 1898 and the following 23rd October 1898, from 15s. to 17s. 6d. a week by selling cement. The defendant was sentenced to six months' imprisonment. An order for review of this decision was obtained upon the ground that the evidence had been improperly admitted.

Forlonge to move the order absolute.

Lewers to show cause—The onus of proving that the defendant has insufficient lawful means of support is on the defendant: *Police Offences Act* 1891, sec. 11. The fact that other offences are disclosed is no objection to the evidence upon this charge. On the question of costs counsel referred to *Duncan v. Pilcher* (a).

(a) [1895] 21 V.L.R. 412.

Forlonge in reply was not heard.

MADDEN, C.J. In my opinion this order *nisi* should be made absolute, and upon the first principle of our law, that a man should answer that charge only upon which he is charged, and if evidence is brought of other charges not properly preferred against him then the conviction against him is bad. In this case the Act of Parliament has provided that a person who has insufficient lawful means of support, and who on being required to satisfy the Court of Petty Sessions that he has sufficient lawful means of support fails to do so, is deemed to be an idle and disorderly person. Therefore, upon the very threshold of the business is the necessity of proof by the accuser that the person charged has insufficient lawful means of support. If he proves that—and the burden is upon him to prove it—then, when that is done, the accused person must show that although appearances are against him he has sufficient lawful means. The Act says that if he fails to satisfy the justices in this respect then he is deemed to be an idle and disorderly person. It is not charged against him that he is an idle and disorderly person, but that in consequence of his want of lawful means he is deemed to be an idle and disorderly person. It would be manifestly wrong to charge him with having insufficient lawful means of support, and then, when he comes to court, to show that he has been convicted of larceny twelve months ago, or that he was in the habit of mixing with idle and disorderly persons some time ago. That would necessarily be taking a man by surprise who is as in this case charged only with having insufficient lawful means of support. In the present case there is not a particle of evidence that the man was without sufficient lawful means of support. It has been endeavoured to be proved by the evidence of one witness that he saw the prisoner on one occasion pick a pocket, and that in May last he was charged with vagrancy. It does not appear that he was ever convicted. But that evidence has no bearing on this particular charge. The order *nisi* will be made absolute, on the ground that the evidence has been wrongly received, and I think also with the ordinary consequences as to costs. The effect of my decision is that the justices cannot look at the

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evidence in question, and that being so, it is not compe
me to look at it for the purpose of costs. There is no
in the Court below against the prisoner, and therefore
none here. Order absolute, with costs.

Order abso

Solicitor for informant : *Guinness*, Crown Solicitor.Solicitor for prisoner : *Forlonge*.

R.

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*Donatio mortis causâ—Bank deposit receipt—Imperfect gift—Property
by mere delivery—Illness of donor—Expectation of recovery—Costs
to costs where subject matter of donatio is large proportion of estate,
it is small—Remarks upon nature of proof of donatio mortis causâ—*

Where persons on their death-bed or believing they are about to die
gift of property not passing completely by the mere handing over (as
transferable bank deposit receipt), the Court has given effect to it as
mortis causâ, and has caused the executors of the donor to complete
intended bounty.

There may be a good *donatio mortis causâ* of a non-transferable bank
receipt by the mere handing of it over to another by way of gift by
not expecting to recover from an existing illness, although nothing is
the donor getting it back in case of recovery.

If a person makes a gift by way of *donatio mortis causâ* of a large
of his estate, under circumstances which justify his executors in requiring
donee to prove his claim in Court, the costs of an action by the donee
which he proves his claim, should come out of the whole estate, in case
subject matter of the *donatio mortis causâ*; and where the subject matter
one-fifth of the whole estate, the Court, as a rough equalization of the
costs, left the donee to abide his own costs and ordered the costs of the
and of the beneficiaries under the will to come out of the estate other than
subject-matter of the *donatio*.

Semble, the general rule would be that the whole costs should come out of
rest of the estate where the subject matter of the *donatio mortis causâ*
but a small proportion of the whole estate.

The Court upon a question of *donatio mortis causâ* will accept evidence
previous statements of the alleged donor that might be given in a testator's
cause.

ACTION by Alfred Cartledge against Charles Frederic Cartledge
and Charles McCandlish, executors of the will of Phœbe Cartledge
deceased, and Margaret Hambleton on behalf of and as executrix of
sentencing herself and Elizabeth Hume, Margaret Russell

Phœbe McCandlish (an infant under the age of 21 years), Alexander McKenzie, and Archibald Moorehead, beneficiaries under the said will, to establish that a certain bank deposit receipt for 1000*l.* had been given by Phœbe Nisbet to the plaintiff by way of a *donatio mortis causâ*.

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Phœbe Nisbet died upon the 13th April 1898, leaving a will bearing date the 16th of January 1894, whereby she appointed the defendants Heales and McCandlish executors, and gave her property in various shares to the defendant Margaret Hambleton and to the persons on whose behalf she was sued. It was alleged that the interests of these persons were the same as that of Margaret Hambleton. and at the trial, on application of counsel for Margaret Hambleton, an order was made that she should represent them.

The plaintiff, by his statement of claim, alleged that on the 8th April 1898 the testatrix gave and delivered to the plaintiff by way of a *donatio mortis causâ*, a certain deposit receipt then belonging to her, issued to her on the 7th September 1897 by the Union Bank of Australia Limited, at Melbourne, for the sum of 1000*l.*, which was payable on the 7th September 1898 by the bank to her, together with interest. This deposit receipt was now in the possession of the executors, and neither principal nor interest had been paid to him, and he sought a declaration that such gift and delivery to the plaintiff was a valid *donatio mortis causâ* to the plaintiff of the deposit receipt, and the 1000*l.* represented thereby, together with the interest accrued thereon, and that he was entitled to the deposit receipt and the moneys represented thereby, and it asked for an order that the executors should deliver the deposit receipt to him, and execute all necessary documents and do all necessary acts and things to enable him to receive and recover the moneys represented thereby.

The defendant executors denied the allegations made by the statement of claim as above stated, and alleged that they had paid to the Crown 20*l.* 6*s.* probate duty on the 1000*l.* and interest as part of the testatrix's estate, and submitted that if the plaintiff was entitled to the 1000*l.* and interest, it should be only on condition that he recouped them such probate duty.

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The defendant Margaret Hambleton denied the all of the statement of claim above stated, and alleged that the deposit receipt was issued and marked on its face as non-transferable, and that she would contend, in those circumstances, even if the facts alleged in the statement of claim were valid *donatio mortis causa* would not arise from the delivery of such deposit receipt to the plaintiff.

The plaintiff as to both defences joined issue and offered to recoup to the executors the probate duty they had paid.

During the taking of evidence, evidence was tendered by the plaintiff of various persons as to conversations they had with the deceased with regard to the plaintiff in reference to work that he had done for her; that the deceased had said that he would not lose by it; and other matters tending to show that she ought and would benefit him. All of this was objected to, and was received subject to the objection. Evidence was also given for the defendants to show that Mrs. Nisbet had stated to several persons that each time the plaintiff did work for her she paid him for it. This was denied by him.

The evidence showed that on the 13th April 1898, at the death of Mrs. Nisbet, the plaintiff called upon one of the executors, Charles M'Candlish, with several deposit receipts of the deceased and her will. One of the deposit receipts—now in question in this action—was as follows:—

“ 2085. (1*d.* stamp embossed.)

“ No. 67759.

Due 7th Sept. 1898.

“ 1000*l.*

The Union Bank of Australia Limited.

“ Melbourne, 7th Sept. 1898.

“ Received from No. 57248

the sum of One Thousand Pounds, as a fixed deposit for 12 months, to bear interest at the rate of two and a half per centum per annum for that period only from the date hereof.

“ For and on behalf of the Union Bank of Australia Limited

“ T. GEO. TEAGUE,

“ Entd. A. R. LAWRENCE,

“ Pro Manager

“ Pro Accountant.”

the back of the document was this indorsement:—

This receipt is not transferable, nor can it be drawn against the bank or otherwise. It must be returned to the bank when the deposit can be either withdrawn or renewed. Interest will be paid on expiry of the term for which the money is deposited.

Other deposit receipts, in similar form, were as follows:—
 One in the Union Bank, each for twelve months, for 500*l.*, and 400*l.*, due respectively on 24th August 1899, 8th September 1899, and 8th February 1899, and one in the Bank of Australia, 1000*l.*, for three years, due on the 15th February 1902.
 Mr. McCandlish and the plaintiff then waited on the executor, Mr. Heales, a member of the firm of solicitors, Messrs. Gibbs and Heales, and the plaintiff handed over all the deposit receipts and the will to him, taking a receipt from Mr. Heales to the effect that he had received the same. He also set out the statement made at the interview by the executor.
 It was as follows:—

“ 13th April 1898.

“ *Re Mrs. Nisbet's Estate.*

I have received from Mr. A. Cartledge, deposit receipt for 1000*l.* in the Union Bank of Australia Limited, No. 57,248, due 7th September 1898. This deposit receipt, Mr. Cartledge informs me, was given by the late Mrs. Nisbet to him in recompense of her kindness to her, and to see she was decently buried, and that she would like a double monument erected over the grave of her husband and her late husband, which Mr. Cartledge promised to do. This deposit receipt was given by Mrs. Nisbet to Mr. Cartledge on Friday last, the 8th inst., in the presence of a Mrs. Gibbs and Mr. Cartledge only hands us this receipt to enable us to get title for the money.

“(Signed) GIBBS AND HEALES.”

On the 20th April Messrs. Gibbs and Heales wrote to the plaintiff as follows:—

The executors of the late Mrs. Nisbet have been considering our claim to the 1000*l.* deposit receipt handed to them, and with other deposit receipts and the will of Mrs. Phoebe Nisbet, by you; and for their protection, and in order more

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properly to deal with your claim they require from you a statement in writing signed by you of all the conversation that took place between the deceased and you on the occasion of the alleged gift to you of the deposit receipt, and also a statement of how you came to be in possession of the other deposit receipt and the will handed to the executors. They also require a statement in writing, signed by Mrs. Ford, of her remembrance of all that was said on the occasion of the alleged gift to you.

"On receiving these statements they will further consider the matter."

The plaintiff replied to this as follows:—

"40 Varian-street, Abbotsford,

"April 23rd

"Alfred Cartledge to Messrs. Heales and McCandlish, executors
 of the late Mrs. P. Nisbet (deceased).

"Dear Sirs,—

"In reply to yours of the 20th inst. requiring a statement from me as to the conversation that took place between the deceased and myself at the time she made me out the deposit receipt to me, I have the honour to state that on Friday, the 8th inst. (Good Friday), I was sitting in Mrs. Ford's bedroom talking to her, when the nurse said, 'Tea is ready.' Mrs. Nisbet said, 'Go and have a cup of tea, and come back to me, as I want you very particular after tea.' I had tea and came back into the room to her. She then called Mr. Ford, whom she always called Carrie, and said to her, 'Get the keys, Carrie.' Picking one key out she said to her, 'Open the drawer and bring me my little satchel,' which Mrs. Ford brought. She (Mrs. Nisbet) opened the bag, and took out some papers and examined them. Taking one from the rest she said, 'I will take the number of this one,' which Mrs. Ford did as requested. The number on the deposit receipt was 57248, and was for £1000l. on the Union Bank. Then she (Mrs. Nisbet) handed the deposit receipt to me, saying as she did so, 'Here is some money for you which will repay you for your kindness to me for many years past, and which I have often promised to do; but you will see that I am decently buried, and I would like to be

alongside of Jock (meaning her late husband, Mr. David Nisbet), as it is a double grave, and I would like a headstone.' I promised that I would see her decently buried and do all she wished me to do. She then placed the other papers back in the bag, together with a blue envelope, which she said was a will, but that if she lived to get up again she intended to alter it altogether. Mrs. Ford was present at the time, and heard and saw everything that was said and done. A day or two after this I was speaking to Dr. Morton, who was her medical attendant, on his visiting her, when he said to me, 'Has she made a will?' I said, 'Yes, I believe she has a will, but she talks of altering it.' I then told Dr. Morton that she had given me a very nice present on Friday, the 8th inst., by giving me a bank deposit receipt. This Dr. Morton can testify to also on oath if required, as he recollects me speaking to him on the matter on his visiting Mrs. Nisbet subsequent to Good Friday and before Monday, the 11th inst., when she took a turn for the worse. *Re* how I became possessed of the other papers and the will of the deceased: I was with her until about 11 p.m. on the night of the 12th inst., when I left the place. I asked a niece of the late Mrs. Nisbet (a Mrs. Hume), who had come there that day to see her aunt, to remain in the house with her aunt, as I believed she would not live long, and to take charge of the house if anything should happen in my absence, and if her aunt died before morning to let me know as soon as possible, and I would attend to everything, as Mrs. Nisbet had always, for several years past, led me to understand that I was one of her executors. In fact, she had told several people that I was her trustee. Mr. Adams, house and land agent, could testify to this if necessary, also the persons living in the house, and the man-servant. So on the morning of her death I proceeded to the house and asked Mrs. Hume to open the drawer and give me the satchel, as it contained the will. I read the will when I got to Mr. Allison's, the undertaker, in his presence in his office, and thus found that I was not one of the executors and I immediately sought out Mr. C. McCandlish, who was named. Together with him I went to the other executor, Mr. Heales, and handed over all the papers and the will."

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Mrs. Ford sent a signed statement in the following terms:

"72 Chomley Street,
 "Prahran.
 "23/

"To Gibbs & Heales, Solicitors, Melbourne.

"Gentlemen,

"Sirs, — Mr. Cartledge informs me that he requires a statement from me *re* the gift of a bank receipt to Mr. Cartledge which the late Mrs. Nisbet gave to Mr. Cartledge on Good Friday last. I was present at the time. It was in the evening between 7 and 8 o'clock when Mrs. Nisbet said she wanted me to open a drawer and take out a satchel, which she opened and took out some papers, and took out one, saying to me—'Carrie, please give me the number of this one,' which I did, and Mrs. Nisbet handed it over to Mr. Cartledge, saying she had promised him something a long time ago and that this would repay him for his kindness to her, and also asked him to see her decently after her death, and Mr. Cartledge promised her that he would. She then took the papers in the bag and told me to put it back in the drawer she had taken it from, and lock the drawer and place the key in another drawer, which I did. She also said if she should get up again she would alter her will and that I should not forget it.

"Yours respectfully,

"GRACE FORD

Davis for the plaintiff—A deposit receipt, although not transferable, may be the subject of a *donatio mortis causa* *re Dillon* (a); *Tierney v. Halfpenny* (b). The only evidence is clear that it was delivered by Mrs. Nisbet to the plaintiff with the intention of giving it, and the evidence is in accordance with the probabilities. It is apparent that it was given in contemplation of death, for she made special mention of it to her burial and tombstone.

Agg and *Hayes* for the defendants *Heales* and *McCart*. The question raised by the evidence, if it be believed, is

(a) [1890] 44 Ch. D. 76.

(b) [1883] 9 V. L. R. Eq. 1.

giving over of the deposit receipt was intended as an immediate gift or as a *donatio mortis causa*. To create the evidence must be of the clearest and most unequivocal character that the donor gave it in contemplation of death, and if she survived it was to be given back to her: *Cosnihan v. (c)*. It is submitted that if the Court should decide in favour of the plaintiff he should pay the defendant's costs. If it is decided in his favour that the defendant's costs should come out of the 1000*l*. It has been separated from the estate, and used for the whole litigation.

BECKETT, J. Supposing Mrs. Nisbet acted imprudently in a way to create suspicion, but that the plaintiff's story is proved, I should like some authority, if there is any, for the proposition that under such circumstances the costs should come out of the particular fund—that is, upon the deposit receipt. My impression is that the executors were fully justified in paying this case to be proved in open Court. The general rule in such a case is that the costs should come out of the whole estate, not out of the particular fund. But in this case it would be unduly hard with reference to the persons who do not take under the gift. I can understand that if there is a large estate, worth, say, 20,000*l*., and a man gets a donation of 300*l*., it would be fair to order the costs to be paid out of the general estate; but in this case, where it is one-fifth of the whole estate, my present impression is that I should leave the plaintiff to abide his own costs, and the costs of the other parties to come out of the estate. That would be a rough dividing of the costs.

vis—In *Tierney v. Halfpenny (d)* the claimant was left to pay her own costs.]

but for special reasons which do not exist here.

vis—In *Moore v. Moore (e)* costs were ordered to be paid out of the estate.]

vis—In *Thorogood (f)* shows that costs of an administration are generally payable out of the estate, if necessitated by a particular part only of the estate, will be limited to it,

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[1862] 15 Moo. P.C. 215.

(e) [1874] L.R. 18 Eq. 487.

[1883] 9 V.L.R. Eq. 152.

(f) [1884] 10 V.L.R. Eq. 117.

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unless they are very small. The plaintiff, by his pleading to recoup the probate duty paid, and by his evidence showing he accepted the gift on condition that he should pay the expenses. Any declaration in his favour should be subject to payment of the duty and funeral expenses.

Duffy and *Cussen* for the defendant Margaret Han representing herself and the other beneficiaries under the will. As the deposit receipt was not transferable, and did not constitute mere delivery, the handing over was imperfect as a gift.

[A'BECKETT, J. I agree with you that, unless it was a *donatio mortis causa* it was an imperfect gift, and cannot be supported; but we have only now to deal with the question whether it was a valid *donatio mortis causa* or not?]

To be such it must be given in contemplation of death, and the existing disorder, and not to take effect if the donor recovered from it. Even taking the whole of the evidence against the plaintiff as to the gift as correct, there is no statement that the deposit receipt was to be returned if Mrs. Nisbet recovered. It is submitted, however, that the evidence against the plaintiff and Mrs. Ford ought not to be believed. From the nature of their story no direct evidence could be obtained to contradict them; but where their evidence could be tested it has been shown to be entirely untrustworthy—they cannot be believed not only the other witnesses, but one another.

Davis in reply.

[A'BECKETT, J. I will not require you to address the facts; but as there was no express condition that Mrs. Nisbet did not get better Mr. Cartledge must hand the deposit receipt back, I should be glad of a reference to the evidence showing its absence to be immaterial.]

Such a condition is assumed: 2 *Wh. and Tud., L.C.* (6th ed.), 1079, citing *Gardner v. Parker* (g). We do not treat it as a gift, because the gift was not complete. If it was a valid *donatio mortis causa* it was nothing, because the deposit receipt was neither transferable nor transferred.

(g) [1818] 3 Madd. 184.

A'BECKETT, J. There are various defences set up to the plaintiff's claim in this case, and that which Mr. Davis has last dealt with is an objection in point of law—that supposing the facts to be truly stated there is not sufficient to constitute a good *donatio mortis causæ*, and that as a gift it is incomplete. If Mrs. Nisbet had met Mr. Cartledge in the street when in good health and said, “Here, Mr. Cartledge, I will give you this for what you have done for me,” that would have been an imperfect gift, and the Court could not have required the executors after her death to make it good, but where persons on their death-bed, or believing they are about to die, make gifts of property not passing completely by the mere handing over, the Court has given effect to such gifts if satisfied that they were made under the conditions which bring the gift within the legal category. It is quite clear Mrs. Nisbet did not say anything as to getting back this receipt in case of her recovery; but it is quite clear that it was given at a time at which she did not expect to recover, and in connection with her anticipation of death and in reference to what should be done after her death as to her monument and her funeral and so on. So I have no doubt that upon the facts, whether as they appear in the letter which was written to the executors, or in the evidence before me, that his gift was made under the conditions which would make it a good *donatio mortis causæ*.

Then I have to deal with the question of evidence—whether the evidence is such as should satisfy me of this gift having been made; and as to that I have felt difficulty—I have felt some degree of doubt, and I do not decide this case with the same confidence that I may not have been misled as I frequently feel. In some cases I feel there is no doubt. As to the facts in this case I have some doubt, but recognizing the fact that the onus of proof rests on the plaintiff most decidedly, and that, if I am left in a position in which I am not able to make up my mind, the plaintiff should suffer for it, and that I should find in favour of the defendant. I feel myself able to decide for reasons which I will state. The circumstances were such that it would have been possible for a fraud to have been committed by the two persons who have given evidence as to this gift. It would have

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been a matter of slight difficulty, not involving any considerable risk, to have abstracted this receipt, and to have concocted a connected story which has been told in this Court; but it is not to be assumed that, because persons may act dishonestly, they have done so, and that, when they come forward and give an account consistent with facts beyond doubt, that it should be disregarded because the statements might have been made without risk of detection. Why I have felt doubt as to whether I was justified in acting on the evidence of Mr. Cartledge and Mrs. Ford is the fact which has been properly dwelt upon by counsel for the persons interested—that relations existed between Mr. Cartledge and Mrs. Ford as to which I cannot accept the evidence as truthful. They are in some points—not of great importance, and, of course, not at all important in reference to this particular occasion—in conflict with one another and contradict one another. They cannot both have spoken the truth as to them, and supposing that positive false statements have been made by Mrs. Ford in a desire to protect her character or to conceal relations which she feels justified in concealing, if the untruth on that subject rests with her, I cannot accept the evidence of Mr. Cartledge as a candid, careful witness, desirous of speaking straightforwardly with the Court in reference to that subject. This throws a cloud of suspicion over these witnesses, who are the only witnesses to the gift, and opens the consideration of the possibility—the practicability—of a fraud such as I have adverted to having been committed, which has caused me much anxious consideration as to what my duty is with reference to the evidence given by persons, one of whom must, as I have been untruthful in stating the character of their intentions. In that condition of mind I have looked, as I am entitled to do, to the probabilities, and to the support or otherwise their statements may sustain from the evidence of other witnesses, some of whom the evidence has been received subject to objection. As to this I think I am at liberty in a case of this kind, where the defence is necessarily the falsehood of the story told by the plaintiff and the other person present at the time, to consider the evidence as to the probabilities, and to do so on the same sort of evidence as to the declarations of the de-

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reference to her intended bounty as would be admissible in the case of a contested will, not as evidence of the gift but as excluding the inference the Court is urged to draw from the improbability of such a gift being made to the donee. When I come to that evidence I do find from disinterested witnesses distinct evidence of Mrs. Nisbet having expressed a sense of obligation (whether exaggerated or not does not matter) towards Mr. Cartledge, and a desire to do something for him. The first is Mr. Adams, the estate agent, who had known Mrs. Nisbet for a number of years, and remembers her speaking of Mr. Cartledge acting on her behalf and saying that he would be at no loss by it. Then Dr. Morton, a perfectly irreproachable witness as to intelligence and recollection, says she was not satisfied as to her former will, and spoke of making a new will, and making a provision for Mr. Cartledge. The evidence of Mr. Wyatt is rather against the plaintiff, except that she mentioned him as a kind friend who did her business for her. She spoke to him about the first will and the new will, and mentioned the persons to whom she intended to leave her property, and did not mention Mr. Cartledge. Then one witness was called this morning, who I believe was a truthful witness, McCahon, who said that she spoke of leaving him a handsome present. There is disinterested evidence as to her feelings of goodwill and intended benefit towards Mr. Cartledge. Then I ought also to say that whatever the relations of Mr. Cartledge and Mrs. Ford were, they were not unknown to Mrs. Nisbet. She was not a person who was tricked into the supposition that an affectionate father and daughter were paying visits to her. She knew what their relations were—that he was a married man, on terms of close intimacy with a married woman living apart from her husband. We can easily suppose what Mrs. Nisbet would have understood that to express. She introduced this woman as this man's daughter, and she was not unaware of the relation in which they stood one to the other, but that did not prevent her from doing what she did with reference to Mr. Cartledge in the presence of Mrs. Ford. As to other probabilities, there is evidence which I consider as most important that Mr. Cartledge,

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when it was in doubt whether she had made a new will or not, and when she had her full senses and might still have made a will, did mention that she had made him a present of a deposit receipt. That would have been indeed a bold stroke of policy supposing it to have been as suggested that he had got possession of this deposit receipt without the knowledge or consent of Mrs. Nisbet. There is undoubtedly this statement made when she was able to express her wishes, and in full possession of her senses, and when it was likely to come to her ears. I regard that as a strong corroboration of the statement made by Mr. Cartledge and Mrs. Ford. There is another important statement by Mr. McCahon, that on Good Friday he remembers these people being alone with Mrs. Nisbet, and her saying this to him—that he might go outside, that she wanted to speak to Mr. Cartledge privately; that Mrs. Ford was there, and that he went out. Then we had the other fact, to which reference has been made, that in point of fact the deposit receipt was in the plaintiff's possession, and was shown to Mr. Allison, not before her death, but at a time when, according to the other evidence, he could not well have had possession of it unless she had given it to him. Notwithstanding the observations, which I have felt it my duty to make in reference to the evidence of Mr. Cartledge and Mrs. Ford, I do on the whole believe that this receipt was given in the way they describe, and therefore that it was a good *donatio mortis causæ*.

Reference has been made to certain observations made by Mrs. Nisbet at the time to Mr. Cartledge as to his putting up a monument and seeing that her funeral was well conducted, to which he expressed assent, and he appears to have been then under the belief that he was to be one of her executors, I do not think that his assertion of this belief, when he went and got possession of those papers, was a piece of acting and a pretence. I think he believed that he was in a position of authority, and his assumption of authority is another fact in the case which tends in the direction of the other facts as against the probability of his having, with the assistance of Mrs. Ford, ransacked the papers of the testatrix before her death. Had he done so he could not have fallen into that error. I am, however, dealing

with the matter now to determine whether his assent should be held to create a legal obligation, and be declared to be one attached as a trust to the gift. I hold that it did not create a legal obligation. He knows, from what was said, how far it was a moral obligation on him. There has been the funeral she desired, and on the other point I shall not make any declaration binding on him as a matter of law.

As to costs, I have already expressed my views. If this was a small gift and a large estate, the costs should come out of the estate. As it is a large proportion of the estate, and I have a discretion as to costs, I think it would be a proper exercise of that discretion, in view of the facts of this case, to direct that the plaintiff abide his own costs, and that the costs of the persons beneficially interested and of the executors come out of the estate. I may say that the executors only acted in discharge of their duty in bringing the matter before the Court. Their costs should be taxed between solicitor and client. Direct the costs of the defendants to be taxed as between solicitor and client, and paid out of the general residue; and that the executors do all that is necessary to give Mr. Cartledge this money, less the probate duty, which it is admitted should be deducted.

Solicitor for plaintiff: *Lyle*.

Solicitors for the executors: *Gibbs & Heales*.

Solicitors for defendant Hambleton: *Hodgson & Finlayson*.

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F.C.
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Health Act 1890 (No. 1098), ss. 216, 221, 223, 226—Nuisance—Offensive business—Negligence in carrying on offensive trade.

Under Part X. of Act No. 1098, Division I., sec. 221, any person who keeps his premises in such a state as not to be a nuisance may be convicted of an offence. Under Part X., Division II., sec. 226, any person carrying on an offensive or noxious trade in such a way as to become a nuisance may be convicted of an offence.

A person registered under Division II., and carrying on an offensive business, was charged, under sec. 221, with neglecting to keep his premises in such a state as not to be a nuisance. It was found as a fact that the business, even if carried on in a proper and clean way, would have been a nuisance; but it was found as a fact that the defendant had kept his premises in an unclean and dirty state.

Held, that the defendant was properly charged and convicted under the said Act.

THIS was a case stated by the Chairman of General Sessions. The following is the case stated:—

“The appellant, Henry Dale, was charged before the Court of Petty Sessions at Oakleigh on the twenty-eighth day of October 1897, upon an information laid by John Colville, Secretary to the Board of Public Health, and a member of the said board, for that the said Henry Dale on the said day of September 1897, at East Brighton, in the Bailiwick, in the colony of Victoria, did unlawfully neglect to keep in such a state in respect of cleanliness as not to be a nuisance certain premises situate at or near the corner of the said Warragul roads, in the shire of Moorabbin in the said bailiwick, of which premises the said Henry Dale was then the occupier, contrary to the statute. The said Henry Dale was convicted of the said offence, and ordered to pay a fine or penalty of ten pounds and ten pounds ten shillings for costs.”

“The said Henry Dale, feeling aggrieved, appealed from the said Court of General Sessions against the said conviction.”

“The following is a copy of the grounds of appeal (as set out in the appellant's notice of appeal) which are made in this case:—

“That I am not guilty of the said alleged offence.

“That the said conviction was against the merits of the case and the justice of the case.

“That there was no evidence to support the said conviction.”

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"That the said conviction was against evidence and the weight of evidence.

"That the said conviction was contrary to law.

"That sec. 221 of the *Health Act* 1890 does not apply to nuisances arising from noxious or offensive trades duly registered as such under sec. 224 of the *Health Act* 1890.

"That proceedings, if any, against the defendant should have been instituted under the provisions of Division II. of Part X. of the *Health Act* 1890.

"The said appeal came on for hearing before me on the tenth day of December 1897, when evidence was called on behalf of the respondents and appellant respectively.

"I found as facts that on the date of the alleged offence the appellant was the owner and occupier of the premises in question, and that such premises were used for the purpose of carrying on a noxious or offensive trade, to wit, boiling-down works and bone-mills, and the same were duly registered as a 'noxious trades establishment' under sec. 224 of the *Health Act* 1890.

"I also found as facts that the said appellant 'in so using the said premises' did neglect to keep in such a state in respect of cleanliness as not to be a nuisance his said premises.

"It was not denied that even if the premises had been kept as clean as possible there would have been a nuisance arising from the carrying on of such business; but the above finding relates to an excess of nuisance arising from the unnecessarily dirty state in which the said premises were kept.

"But I held, as a matter of law, that sec. 221 of the *Health Act* 1890 does not apply to such a state of facts, and that the only way to proceed against the owner or occupier of such premises is under Division II. of Part X. of the said Act, and for this reason I quashed the conviction against the appellant.

"At the request of the respondents I agreed to state the facts specially for the determination of the Supreme Court.

"E. B. HAMILTON,

"Chairman of the General Sessions of the Peace for the Central Bailiwick."

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The case came before A'Beckett, J., and was referred to the Full Court.

Isaacs, Att.-Gen. (with him *McArthur*), for the respondent *Colville*—The appellant was rightly charged under sec. 216 of the Act No. 1098 for neglecting to keep his premises in such a state as not to be a nuisance or injurious to health. The facts clearly bear out the charge. Part X. of the Act has a main heading "Nuisances." Division I. is headed "Nuisances Generally;" Division II. "Offensive Trades;" but there is nothing in Division II. which restricts the punishment of a person registered under Division II. to proceedings under that division only. He may be punished under that division, but he is also liable under sec. 216. The penalty if he has committed an offence against sec. 216 is general in its terms, and applies to all nuisances. Sec. 217 speaks of "any nuisance under this Part of this Act," but does not refer to any particular division. Sec. 219 uses the same words. It was only in the consolidated Acts that Part X. was divided into "divisions." Sec. 226 deals with nuisances arising from offensive trades, but it is only additional to the general provisions of sec. 221.

[HOOD, J. Sec. 226 refers to a trade being a nuisance, and the necessary consequence of its being carried on at all, while sec. 221 deals with negligence in the carrying on of any trade.]

Sec. 221 goes even further than that.

Counsel referred to the provisions of Act No. 264, 1872, and Act No. 1044.

Kilpatrick for the appellant *Dale*—The policy of the Legislature has been to differentiate between "nuisances generally" and "offensive or noxious trades." The Legislature in 1872 for the first time legislated for "nuisances generally." In the Act No. 264, there was already provision made for dealing with offensive or noxious trades, and the intention of the later amending Acts has been to keep the two classes separate, and to deal with them as separate offences. A distinct provision is made in Division II. for dealing with offensive trades, quite apart from the general terms used in sec. 221 in Division I.

and any offence under Division II. must be dealt with according to the procedure therein provided. Division II. is complete in itself; it is confined to a definite class of trade, and contains all the necessary machinery for regulating "offensive trades."

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WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, HOLROYD, and HOOD, JJ.] This is a special case stated by the Chairman of General Sessions, Melbourne, on an appeal to General Sessions by one Dale, who had been convicted before the Court of Petty Sessions on the prosecution of Colville for an offence under sec. 221 of the *Health Act* 1890. (His Honor read the information.) The justices found him guilty of the offence and he appealed to General Sessions, and the conviction was quashed on the ground that the defendant in the Court below could not be prosecuted under sec. 221 upon the facts alleged, but that he should have been prosecuted under Division II. of Part X. of the Act. The Chairman of General Sessions has found certain facts, and has stated such facts in the case, as it was his duty to do. (His Honor read the findings.) Taking these statements together, it amounts to this, that the Chairman of General Sessions finds as a fact that the appellant in so using these premises kept them in an unnecessarily dirty state, so as to create a nuisance.

The question is whether under the findings the defendant could have been convicted under sec. 221 in Division I., Part X., of the Act. We think he could. Part X. begins with the heading "Nuisances," and it is plain that that heading "Nuisances" applies not only to Division I. but also to Division II. Division I. has a separate heading "Nuisances Generally," and Division II. is headed "Offensive Trades;" but the general heading "Nuisances Generally" applies to both Divisions. Division II. relates to persons who carry on offensive or noxious trades, and contemplates persons carrying on such trades in such a way as not to be a nuisance or injurious to public health under certain conditions. In other words, it authorizes and permits persons to carry on offensive trades under certain conditions so long as the carrying on of such trades does not amount to a nuisance. Division II. provides what shall be done and what steps taken to stop these trades

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if it turns out that the carrying on of the same is either a nuisance or injurious to public health. It must be remembered that this is a *Public Health Act*, and that the whole of this Part X. of this Act is pregnant with provisions carefully worded to prevent the creation of nuisances or the doing of anything that may be injurious to public health. Sec. 223 makes certain provisions relating to offensive trades, and provides that the consent in writing of the council is to be obtained. Prior to granting such consent, a notice has to be given of the intention of the person proposing to carry on such trade. That is for the purpose of inviting objections. Then, if he gets such consent, he has to register, as the appellant did in this case. He has to register the place as a noxious trade establishment and if it should appear to the council after registration and before the renewal that the carrying on of this trade has become a nuisance or injurious to the public health the council may refuse to renew such registration. Then sec. 226 provides that where an offensive or noxious trade is certified by certain persons to the council to be a nuisance or injurious to public health, such council may cause a complaint to be made before a justice, and then provision is made for the infliction of a penalty or for taking steps to abate the nuisance. The effect of Division II. appears to be this, that a person may, under certain conditions as to obtaining consent, getting registered, etc., carry on a business which is admittedly noxious or offensive. If it turns out that this business becomes a nuisance or injurious to public health, then under this Division certain steps may be taken to stop it, and to punish the person carrying it on, or, if it be deemed practicable to abate the nuisance then judgment may be suspended to enable such steps to be taken to abate the nuisance. Division II. clearly relates to the carrying on of a business in a proper and necessary way, and in such a way that it would not be, except in so far as it necessarily arises from the carrying on of such a business at all, injurious to public health. If the nuisance arising from it only necessarily arose from the carrying on of that business, then we think that the proceedings would have to be taken under this Division II. But that is not this case. The appellant in this case has not been convicted, nor

summoned, nor informed against for a nuisance arising from the necessary and legitimate carrying on of this offensive trade or business. What he has been summoned for is for an offence under sec. 221, for neglecting to keep his premises in such a state as not to be a nuisance; that is what he was convicted of, and the Chairman has found that the defendant kept his premises in an unnecessarily filthy state, not in a state which amounted to a nuisance necessary from the carrying on of the business; he has not found that the premises were in such a state as to become a nuisance necessary from the carrying on of such a business, but he has found that they were kept in an unnecessarily filthy state. At the same time we may take it as a fact found or admitted in this case that the business could not have been carried on even in a proper way without being a nuisance. Therefore, it appears that the appellant might have been prosecuted under both of these Divisions. He could have been prosecuted under Division II. for carrying on this business (although he carried it on in a proper and clean way), inasmuch as the carrying it on amounted to a nuisance. He also committed another offence outside Division II. and under Division I., and that other offence is that, while carrying on this business, he kept his premises in an unnecessarily dirty and filthy state, so as to create a nuisance, and for this he has been summoned and convicted under sec. 221. It is only necessary just to refer to the provisions of sec. 216 (1), which speaks of—"Any house or premises in such a state as to be a nuisance or injurious to health;" then sec. 217 speaks of "Information of any nuisance under this Part of this Act." It does not say "under this Division of this Act;" the same language occurs in sec. 219. Then comes sec. 221. (His Honor read the section.) That is the offence with which this appellant has been charged and found guilty. We think he was rightly convicted, and that the determination of the Court of General Sessions was wrong. The appeal will be dismissed, and the conviction confirmed, with costs in the Court below.

Solicitors for appellant: *Lawson & Jardine.*

Solicitors for respondent: *Gillott, Bates & Moir.*

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 February 15.

IN RE TWOPENNY, EX PARTE THE COLLECTOR OF IMPOSTS
Stamps Act 1892 (No. 1274), s. 25—Stamp Duty—Deed of settlement—Policies of life assurance—Value of.

Under a deed of settlement, under which the sum of 2,000*l.* was settled upon trustees for his wife, covenanted to increase the property to 2,000*l.* The policies were payable on the death of the party assured assessed by the settlor for the purposes of duty at their surrender value at the date of the deed. The collector of imposts charged duty on the set assessing the policies at their full face value. There was no covenant on the part of the settlor to pay the premiums, and the trustees under the deed were not indemnified from any obligation as to keeping up the same.

Held, that the value of the policies assessable for the payment of duty was the surrender value of the same, and not the full face value, and that the amount available for duty under the above circumstances was the percentage of the surrender value under Schedule 8 of the Act on the sum of 2,000*l.* which the settlor covenanted to settle.

CASE stated by the Collector of Imposts under the *Stamps Act 1890*.

The following facts were set out in the case:—(1.) On the 19th October 1898 Messrs. Stawell and Nankivell, as solicitors for R. E. N. Twopenny, the settlor in the abovesaid deed of settlement, produced the said indenture, a copy of which forms part of this case, to the Collector of Imposts under the *Stamps Acts*, hereinafter referred to as the collector, and required his opinion—(a) Whether it was chargeable with stamp duty? (b) With what amount of duty it was chargeable? (2.) Accompanying the said indenture was a statutory declaration by Mr. Twopenny showing that the values appearing in the schedule to the said indenture as being the values of the policies settled are the surrender values of the said policies, including the amount of bonuses declared in respect of the said policies. (3.) On the 21st October 1898 the collector held that the duty on the life policies settled by the indenture was for the purpose of assessing stamp duty the value of the moneys secured by the said policies, including bonus additions already made, and accordingly fixed the value of the property comprised in the settlement at 3,947*l.* 12*s.* 6*d.*, made up as follows:—(a) life insurance policies, 2,708*l.* 6*s.*; (b) marketable securities, 1,239*l.* 6*s.* 6*d.*; and he assessed the duty payable on the said income at 1,239*l.* 6*s.* 6*d.*

at 29*l.* 12*s.* 2*d.* (4.) On the 24th October 1898 Messrs. Stawell and Nankivell paid the duty, 29*l.* 12*s.* 2*d.*, as assessed by the collector, and in writing informed him that their client was dissatisfied with the assessment, and that they required the collector to state and sign a case setting forth the question on which the collector's opinion was required, and the assessment made by him, in order that he might appeal against the same to the Supreme Court. (5.) In compliance with the requisition in this behalf I, John Davidson, the Collector of Imposts under the *Stamps Acts*, do hereby state and sign this case setting forth the question upon which the collector's opinion was required and the assessment made, namely—(a) Whether the instrument was chargeable with any duty? (b) With what amount of duty was it chargeable?

J. DAVIDSON.

The effect of the deed of settlement, so far as is material to this report, is sufficiently stated in the judgment. The matter came before Williams, J., in the first instance, and was referred to the Full Court.

Pigott for the settlor, appellant—It is admitted that duty is chargeable upon the full amount covenanted to be settled—viz., upon £2,000, because there is a covenant that the settlor will increase the securities till that sum be reached. Sec. 25 of Act No. 1274 (a) is not intended to apply to a policy of life assurance at all. In the English Act, 54 & 55 Vict., c. 39, sec. 104, express provision is made as to duty being chargeable upon money which may become due or payable upon any policy of life insurance, and there is a proviso which shows the true method of calculating the value of a policy, which should be adopted in this case if it be held that a policy is within our Act. The proviso in the English Act is—"Where in the case of a policy no provision is made for keeping up the policy the *ad valorem*

(a) "Sec. 25. Where any money is to be charged with *ad valorem* duty which may become due or payable upon in respect of such money and in the any security (not being a marketable case of a marketable security is to be security) is settled or given or agreed charged with the *ad valorem* duty on to be settled or given the instrument the value of such security." whereby such settlement or gift is made

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duty is to be charged only on the value of the policy at the date of the instrument." That would not include the value at the date of the death of the assured. The policy is a security for money within the meaning of sec. 25. Section 25 of the Act determines the stamp duty.

Counsel was stopped by the Court. The following was referred to:—*Sanville v. Commissioner of Inland Revenue*

Leon for the Collector of Imposts, respondent—These are securities upon which money "may become due or payable" and are therefore within sec. 25. A policy is a security for money: *Lawrence v. Galsworthy* (c); *Stokoe v. Cowan*. The intention of the Legislature was to include every security. The value of the security is the value that the person is to receive upon the ultimate realization of the security, or upon maturity. The value to the donee will increase from year to year. By the *Companies Act* 1890, sec. 342, a policy is looked upon as a security.

HOLROYD, J., delivered the judgment of the Court (LIAMS, HOLROYD, and HOOD, JJ.). The question we have to determine arises out of the construction of sec. 25 of the *Stamp Act* 1274. It has been discussed whether a policy of life assurance is a security for money within the meaning of that section. The word "security" is often used in different senses. For the purpose of our decision we may assume that the policy of assurance is a security for money which may become payable. The settlor, Mr. Twopenny, included in his settlement certain policies of assurance upon his own life, partly upon which are set out in the schedule attached to the settlement and which have been, as recited, transferred to trustees for the settlement before this indenture was executed. The settlement contained a covenant under which the settlor was to settle moneys and other property sufficient to increase the settled property to the value in the whole of 2000*l.*, and it has been admitted by the counsel for the settlor that

(b) [1854] 10 Ex. 159.

(c) [1857] 3 Jur. N.S. 101.

(d) [1861] 7 Jur. N.S. 901.

should be taxed upon the percentage as set forth in the schedule to the Act for that amount. (His Honor read sec. 25.) It has been contended that this settlement ought to be charged with duty in respect of the total amount which, if the total amount of the policies should be kept up, and the premiums regularly paid, would ultimately become due upon those policies. We think that that contention is erroneous. The Act does not say that the settlement is to be charged in respect of the amount of those moneys; it does not say it is to be charged on the amount of those moneys, but with *ad valorem* duty in respect of such moneys. What is the *ad valorem* duty? It is duty according to the worth of these moneys. *Ad valorem* duty is duty imposed upon property, and the value of property varies, and it is according to the value of the property that it is charged. We have to read instead of "money," "property," for money is property. What is it that has to be paid? The 8th schedule to the Act, referring to settlements or deeds of gift, and prescribing the percentage which has to be paid according to the value, says—"Where the value of the property does not exceed 1000*l.* 10*s.* per cent.; where the value of the property exceeds 1000*l.* and does not exceed 5000*l.* 15*s.* per cent.," and so on. What is the property which is passed by this settlement? I assume now that the transfer is an actual transfer by which the policies transferred form part of the settlement, for there is only one duty to be paid. The "property" is the right to receive a certain sum or sums of money at an unfixed time—viz., at the death of a particular person—on condition that in the meantime certain annual premiums are regularly paid. That is a thing quite uncertain. It so happens that in this particular settlement the settlor imposes on himself no obligation to pay the annual premiums, and he himself and the trustees are expressly exempted by covenant from any liability to see that these premiums are paid. The right is to receive a certain sum of money at a future time, the period being uncertain, and on a certain condition. What we have to find for the purpose of duty is the value of the property, the value of the right which has passed by the deed; that is what we have to find, and that is a matter of conjecture, but it is estimated by the companies

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under the surrender value of the policies, and that, according to the strict language of this Act, is the duty which is payable. That according to the schedule would be 15*l.* on the 2000*l.* The amount payable in respect of the policies would be very much less than 15*l.*, which is payable in respect of the sum of 2000*l.* covenanted to be paid by the deed. The amount payable in respect of the policies and in respect of the policies contained in the schedule to the deed would amount to less than the amount payable under the covenant, and we think the settlor must pay on the full amount for which he is absolutely liable—viz., 2000*l.* That will be 15*l.* in all. The 29*l.* 12*s.* 2*d.* has been paid, and the excess of that sum of 15*l.* must be refunded by the Collector of Imposts, and he must also pay the costs of the settlor which have been incurred in respect of this appeal.

Solicitors for appellant : *Stawell & Nankivell.*

Solicitor for respondent : *Guinness, Crown Solicitor.*

W. I.

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 December 12.
Madden, C.J.

WILLIAMSON v. CALEDONIAN INSURANCE COMPANY

Insurance—Fire policy—Condition—Waiver—Assignment—Mortgagee—Beneficial interest—Notice—Extent of local agent's authority—Operation of law—Registration—Claim—Rejection—Authority of manager—Delegation of attorney—Agent—District Agent.

The district agent of an insurance company during the currency of a policy issued to him by the company on a building and on the furniture and contents of the mortgagee, sold and transferred all his interest in the mortgage, and on the same date indorsed on the policy a memorandum of transfer of his interest in the policy to the purchaser, from whom he asked and received the full amount of the premium. No notice of the transfer was given by the transferor directly to the office of the company. The property comprised in the policy was, subsequent to the transfer, but during the currency of the policy, destroyed by fire. Condition 10 of the policy ran—“This policy ceases to be in force as to any property hereby insured the absolute beneficial ownership in which shall pass to any person insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed hereon on behalf of the company.”

Held, that this was not an assignment by operation of law and the transferor had under this condition an absolute beneficial interest in the property, and that which interest he purported expressly to assign to the plaintiff, and

notice necessary to be given under the condition was a notice to the manager of the company, and that the memorandum indorsed on the policy was insufficient to bind the company as a notice or as a memorandum under the condition.

Condition 13 of a fire policy provided, *inter alia* :—If the claim be not made within three months after the fire or if made and rejected an action or suit be not commenced within three months after such rejection all benefit under this policy is forfeited.

A claim was made within three months after the fire, but the acting manager of the insurance company refused “to entertain” the claim. No action was instituted until more than three months after this refusal. The company was incorporated by Royal Charter and constituted under the provisions of certain English Acts of Parliament which authorized the appointment of a manager but gave no power to such manager to appoint a substitute. The manager in Victoria purported to appoint a substitute during his absence.

Held, that a refusal to entertain a claim amounted to a rejection, and that the acting manager had power to reject.

ACTION.

By her statement of claim Mary Jane Williamson claimed from the Caledonian Insurance Company the sum of 75*l.*, the amount of a policy of fire insurance issued by the company to one J. H. Curnow on the 11th July 1895, from time to time renewed, and finally renewed by Curnow on the 27th June 1897 for twelve months. The plaintiff claimed as assignee and transferee of the policy by an absolute assignment in writing within the meaning of sec. 63, sub-sec. 6, of the *Supreme Court Act* 1890. It was alleged by the plaintiff that on the 4th November 1897 Curnow assigned to her the policy, and that express notice in writing of such assignment was given by the assignee to the defendant, and that a memorandum was, in accordance with the conditions of the policy, indorsed thereon by or on behalf of the defendant. It was also alleged by the plaintiff that she had an insurable interest in the property and effects insured under the policy, and that these were on the 11th January 1898 totally destroyed by fire, and that all necessary conditions (a) of the policy had been fulfilled by the plaintiff.

(a) *Conditions on back of Policy* :—

“2. (*Inter alia*) . . . if any property hereby insured be also insured in any other office or offices without . . . the assent or sanction of the company signified by indorsement hereon the insurance as to the property affected thereby ceases to attach. If

by reason of alteration of the risk or from any other cause whatever the company or its agents shall desire to terminate the insurance it shall be lawful for the company or its agents so to do by written notice to the insured or his representative and upon such notice being given the insurance by this

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The Caledonian Insurance Company admitted the issued to Curnow, but denied the other facts alleged plaintiff. It also raised the following defences :—

(1.) That the provisions of paragraph 10 of the contract had not been fulfilled, inasmuch as the absolute beneficial ownership in the property insured had passed from the insured to the plaintiff, and no notice thereof was given to the defendant and the subsistence of the insurance in favour of the insured was not and had not been declared by a memorandum on the policy by or on behalf of the defendant.

(2.) That paragraph 13 had not been complied with for the reason of the fact that "if any claim under the policy was made, which the defendant does not admit, the same was rejected by the defendant through its acting manager, William Curnow, and no action or suit was commenced within three months after such rejection."

In her reply the plaintiff joined issue, and alleged that

policy shall be terminated accordingly. Provided that in any such case the company shall on demand by the insured refund for the unexpired time thereof a ratable proportion of the premium received for such insurance.

"10. This policy ceases to be in force as to any property hereby insured the absolute beneficial ownership in which shall pass from the insured to any other person otherwise than by will or operation of law unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed hereon by or on behalf of the company.

"11. On the happening of any loss or damage by fire to any of the property hereby insured the insured is forthwith to give notice in writing thereof to the company or its agent and within 15 days at latest to deliver to the company as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire with the estimated value

of each of them respectively and in regard to their several values in the event of the fire and in support thereof all such vouchers proofs and receipts as may be reasonably required together with if required a declaration of the truth of the facts and in default thereof no claim in respect of such loss or damage shall be payable until such notice accepted and explanations respectively given and produced and a statutory declaration if required have been made.

"13. If the claim be in whole or in part fraudulent or if any statement made in support of the claim be false or if the fire was occasioned by the wilful act of the insured or through the wilful act of the insured or connivance of the insured claimant or if the claim be made more than 3 months after the fire and rejected an action or suit commenced within 3 months after the rejection all benefit under the policy shall be forfeited."

defendant had waived its right to rely upon the non-fulfilment of conditions 10 and 13 by reason of certain facts more particularly referred to in the judgment of Madden, C.J.

R. Hodgson Cole for the plaintiff.

W. Campbell Guest for the defendant.

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MADDEN, C.J. This appears to be a somewhat simple case. Before I go into the matter I think it right to say that the company who defended the action might have been more magnanimous. There may be, however, something else, something suspected by it which in the opinion of its officers warranted them in insisting upon their full legal rights. The company is entitled to insist upon such rights as it possesses.

It is true that a policy of insurance is a document which is to be construed strongly against those who have drawn up its conditions. But to the extent that the conditions are clear an insurance company has a right to insist upon them. There is no different law to be applied in the construction of insurance policies to that to be applied in construing any other contract.

In the present case the matter stands thus:—One Curnow had as mortgagee insured a building and the furniture in it in the office of the defendant company. Subsequently Curnow sold his interest in the property to Mrs. Williamson, the plaintiff, and intended no doubt to transfer to her the remainder of the policy of fire insurance upon the property. It is said by the defendant that Curnow was the agent for the district round Bendigo, whose duties were to receive proposals and claims for insurance, and to forward these claims and proposals for the consideration of the company itself. When Curnow sold the property in question to Mrs. Williamson he indorsed on the policy these words:—"For valuable consideration I hereby transfer all my right, title, and interest in and to the within policy to Mary Jane Williamson, of Kangaroo Flat, married woman.—J. H. CURNOW."

Condition 10 of the policy provides—(His Honor read it). It is now contended by the defendant company that, as a matter

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of fact, it did not receive notice as provided by clause 10 of the subsistence of an insurance in favour of Mrs. Williamson, and therefore that the assignment to her is invalid as against the company. The plaintiff says that condition 10 does not apply to this case, inasmuch as the assignment is one by operation of law. Assuming that the absolute beneficial ownership in the property assured passed to Mrs. Williamson from Curnow—and I think that Curnow had an absolute beneficial interest in the property, which interest he purported to assign—I think the words “operation of law” mean this. If a man dies leaving a will or intestate, then there is a legal transmission of an interest in the deceased’s property apart from the question whether there is an actual assignment or not. In the same way, if a man becomes insolvent, or by other various processes known to the law, there is a devolution of interest. Anything else in the nature of an assignment is an express assignment by a party himself, and not by operation of law. Consequently, where a person sells a property, and wishes to assign a policy upon the property, that must be by an express assignment, and does not take place by operation of law. But it is said that notice was given, and that this is shown by an affirmative act—viz., by the indorsement by Curnow of the memorandum on the policy. It is said here that the company had notice, because the transaction took place between Curnow, the district agent, and the plaintiff, and that Curnow was such agent for the purpose of receiving notice. Notice to him was notice to the company. But I do not think that that is what is meant by the condition, because I observe that in clauses 2 and 11 of the conditions upon the policy wherever an agent is intended to deal with matters the word “agent” is used expressly, and wherever it is intended to bind the company only, the word “agent” is left out. It will be seen that in the conditions referred to if anything could be done by a company it is stated generally, but if anything may be done by an agent the words “by its agent” are used. Therefore, I think that this notice is to be given to the company itself. The receipt of this notice is a responsibility upon the general management of the business; but supposing that the notice to Curnow had been meant to be notice

to the company, that is not enough. Supposing the fact of the insurance is to be notified by an indorsement, there is to be placed on the register a notification of the fact. Therefore, even if Curnow had a notice which bound the company, the other necessary element is wanting.

Then comes the other matter. The question of fact appears to be against the plaintiff. The evidence of the plaintiff and her husband amounts to this:—Being on the 4th November in Curnow's office Curnow handed over the policy to Mrs. Williamson and demanded 11s. 3d. Mrs. Williamson asked "What is this for?" Curnow answered, "It is for the insurance premium. If anything happens I will draw the money for you." There was no demand that he should get rid of condition 10. In my opinion what Curnow meant was, "I will collect the money for you if anything goes wrong." They took his word for that. He might have been intending to get them to give back 11s. 3d. and take the policy. If there was fraud on Curnow's part Mrs. Williamson would have a remedy against him in respect of that fraud. He was not, I think, endeavouring to lead them to believe that he would give notice to the company. As has been contended here by Mr. Guest, the bargain in a fire insurance policy is a personal one. In the case of life assurance policies the personal element is all important. There is the same element in fire insurance policies. There are people to whom no one would issue a fire policy. Corporations carrying on insurance business have a perfect right to select those persons for whom they take the responsibility of insurance. It is contended by Mr. Cole that by his conduct on that occasion Curnow led the plaintiff to believe that he was undertaking to free her from this condition. This is denied by Curnow, who says that he wanted Mrs. Williamson to register, and offered, if given half-a-crown by her, to get it done, but that Mrs. Williamson would not give him the half-crown or trust him with the policy, or give the notice directly to the company. I do not take upon myself to say which of these parties is telling the truth. It is unnecessary to do so. But as the burden of proof is on the plaintiff I find on the facts for the defendant, because Mrs. Williamson has not proved to my satisfaction that her version is true. I am not saying now

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which of the witnesses is telling the truth, but I can say this—that the plaintiff has to satisfy me and has not. I see no greater reason to disbelieve the defendant's witnesses than those of the plaintiff. She has not satisfied me (and she is the party charged with the burden of satisfying me) that Curnow ever assumed the responsibility of paying for her the amount of the insurance money. But whether he did or did not I do not think he had the slightest right to do so. Some authorities have been cited to me on the question that companies are bound by the acts of their agents, but in some cases no doubt these companies would be bound by the statements and representations of their agents. But a company is entitled to rely upon the acts and representations of its agents authorized for that purpose, and to say that in other cases it is not bound. Therefore, where an agent obtains a policy of insurance the company may be bound, but once a policy is issued and is in existence, with its conditions set out in it, these conditions cannot be waived by its local agents. It would be absurd that the conditions of a contract by an insurance corporation, carefully considered and agreed to by the directors, could be waived by such an agent, who may perhaps be a local bootmaker or storekeeper. It would be ridiculous to say that persons such as these could waive the formalities of an insurance contract.

Upon the point of law I entertain no doubt. I therefore hold that as this condition has not been performed by the plaintiff she loses the benefit of this policy. If the company knew of this reason to distrust the honesty of these people in this case, then I find it quite within the scope of my duty to say that it is a very great pity indeed that the company did not pay the plaintiff the small sum due upon the policy. But perhaps the company did know something which I do not. Having decided on this point, the action is in my opinion disposed of.

Clause 13 of the conditions of the policy provides (Honor read it). Under that clause I am of opinion that the plaintiff is barred. The claim was made within three months by the letter of 13th January 1898, and was rejected at once by the acting manager, Wm. Ivory, and was again rejected

a few days later. No action was brought within three months of such rejection. It has been argued that Ivory, the acting manager, had no authority to reject this claim, and that therefore time did not run against the plaintiff. Now, first of all, it was said that Ivory had no right to take upon himself the duty of rejecting a claim; that he should have submitted that duty to the directors. I do not think that it is so. The rejection purported to come from the acting manager. If a person acting as such manager takes upon himself to reject a claim, his rejection certainly binds the company, and is, I think, certainly within the scope of his authority.

Then it is said that Ivory was not the manager, and that therefore he had no power to reject the claim. It is said that under the English Acts of Parliament by which the company is authorized to appoint its manager there is no power given to that manager to delegate his authority to a substitute, and therefore, as Ivory is merely a substitute, he had no power to act as manager. The way in which the company has carried on its business here is by Royal Charter and under a power under the English Acts constituting the company given by its English directors to a manager, who is given by the power a power of delegation of his authority to a substitute. So that when that substitute is appointed the company is bound by his acts. It is contended by Mr. Cole that this is a position the company could not take up, but it appears to me that the Acts authorize the appointment of a manager. If he is not there—for instance, if he is about to die, or to submit to a serious operation—it would be ridiculous to suppose that a company would let its business drift because it could not appoint someone in the place of the absent manager. I think, therefore, that Ivory's appointment is perfectly legitimate, and his rejection brought the condition 13 into operation.

It is then said that the company debated the question again, and that therefore all the matters which had gone before could not be relied upon by the company. It appears from the evidence that the claimant's solicitor wrote to the company urging it to restate its position. There is not in the correspondence any indication

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that the company intended to withdraw its objections. nothing to warrant the plaintiff in supposing that it intended to revive her rejected claim.

It is said also that the rejection is bad, because a rejection of a claim involves a consideration of that claim, and consideration by a company such as the defendant must be given by the directorate. It is argued that it is not sufficient for a director to consider it without any consideration by the directors. It was said that Harper, one of the directors, said he had rejected Mrs. Williamson's claim; but I think, as I said before, that if the manager reject the claim he may take the responsibility, and the company is bound by his rejection. The rejection is perfectly plain.

It is also said that Harper has by his acts disturbed the company. In my opinion, all that happened was this: on the first occasion he told Williamson to call again; on the second occasion he said, "I have considered the matter." Williamson said to him that the agent had notice of the assignment, which Harper replied, "I don't think he comes well off. Write a strong letter to the company." The whole thing was to me an attempt by Harper to put Williamson off. It is not an act upon Harper's part which could bind the company. His act was not that of a director acting in the performance of his duty as a director. He was merely imprudent, and his interference in the matter was extra official and did not bind the company.

I think, therefore, for all these reasons, that, although the company regard its conduct as wanting in generosity, if I look at the facts, the defendant company is entitled to succeed. A valid contract was in subsistence, and the defendant is not entitled to take advantage of any contravention of its provisions. There will be judgment for the defendant, with costs.

Judgment for the defendant.

Solicitor for plaintiff: *J. E. Dixon.*

Solicitor for defendant: *Whiting & Aitken.*

R.

[IN CHAMBERS.]

KINNAIRD v. ALLEN.

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December 12.

A'Beckett, J

*Will—Construction—Gift to person described as “son” of testator’s brother—
Extrinsic evidence as to testator’s intention.*

A testator bequeathed his residuary estate upon trust to pay to his brother the income for the maintenance and education of “his son and daughter who are now living until his youngest child who is now living shall attain the age of twenty-one years,” and after that period he directed his trustee to divide his estate into three equal shares between his brother and “his said son and daughter.” The brother had a daughter but never had a son. There was, however, a boy aged four who was the illegitimate son of the step-daughter of the brother of the testator. This boy was brought up in the brother’s household as one of his family, and might have been supposed to be his son by any acquaintance not informed of the facts as to parentage. The testator visited his brother’s house and observed the children, and there was nothing to suggest that he knew anything as to the real parentage of the boy.

Held, that the boy was entitled to his share of the legacy under the will.

ORIGINATING SUMMONS.

This was an originating summons taken out by Allan Kinnaird, the executor appointed by the will of Richard Allen, deceased, for the determination of the following questions:—

- (1.) In the events which have happened, for whose maintenance should the income of the testator’s estate be applied under the trust in that behalf contained in the will of Richard Allen. (2) In the events which have happened, what person or persons are entitled to share in the final distribution of the estate of the said testator under the direction in that behalf contained in the will of the said deceased, and in what proportion? (3.) Did the testator die intestate as to any, and what part of his property?

The terms of the will, so far as they are material to the report, are set out in the judgment. In addition to the facts set out in the judgment the plaintiff in his affidavit stated that the defendant James Allen, the brother of the testator, at the date of the will was and is still a widower, and had only one child, a daughter named Louisa Allen, who resided with the defendant James Allen, and is an infant aged about ten years. There was also a boy aged four, who was the illegitimate child of a step-daughter of James Allen, and this child resided with and was brought up as a member of the household of James

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Allen. The testator on several occasions while conversing with the plaintiff stated that his brother had two children, a girl and a boy, and just prior to his death reiterated this statement, and said that he did not know the names of the children, and that he had only seen them on a few occasions at his brother's residence when visiting his brother; that he had said that he desired to leave the income of his property to his brother's two children, and eventually that the property should be divided between his brother and his two children. James Allen, the brother of the testator, said that the boy was always called by him William Harris, and that the testator had visited his house on only three occasions after the birth of the boy and had never spoken to the boy or displayed any affection towards him. Other affidavits were filed to the effect set out in the judgment.

Wasley for the plaintiff.

Cussen for the defendant James Allen—The testator no doubt shows an intention to give property to his brother's son who is now living. The gift is not to the boy by specific description as an individual in whom the testator took an interest, but it is a gift to him merely as the son of the testator's brother. Extrinsic evidence has been allowed in certain cases: *In re Harrison* (a); *In re Haseldine* (b). One of the most important things is the knowledge of the testator, and if the testator knew that this boy was *not* the son of his brother, then there might be a strong argument raised in his favour according to those cases. The fact here is that the testator did not know that the boy was not the son. There is no evidence here to show that the testator meant to benefit this boy—the intention was to benefit the son of his brother, and there is no one who fulfils the latter description. Where there is no name mentioned and the person claiming does not fulfil the description the gift fails: *Dorin v. Dorin* (c).

Counsel referred to *Wilkinson v. Joughin* (d).

(a) [1894] 1 Ch. 561.

(b) [1886] 31 Ch. D., p. 511.

(c) [1875] L.R. 7 H.L. 568.

(d) [1866] L.R. 2 Eq. 319.

Pigott for the defendant Louisa Allen adopted the arguments of Mr. Cussen.

Power for the defendant William Harris—The principle is that where a legatee is accurately named or described the Court will gather from surrounding circumstances who was meant by the testator. There is no principle that when a legacy is given in a certain character that the legacy fails if the legatee does not occupy that position. The facts here show that the boy was undoubtedly intended to be benefited.

Counsel referred to the following cases:—*In re Boddington* (e); *Schloss v. Stiebel* (f); *In re Brake* (g); *Feltham's Trusts* (h); *Lee v. Pain* (i).

Cussen in reply referred to *In re Boddington* (k).

Cur. adv. vult.

A'BECKETT, J., read the following judgment:—The testator in this case gives his residuary estate upon trust to pay to his brother the income for the maintenance and education of "his son and daughter who are now living until his youngest child who is now living shall attain the age of twenty-one years," and after that period he directs his trustee to divide his estate into three equal shares between his brother and "his said son and daughter." The brother has a daughter aged ten, but never had a son. There was, however, a boy aged four, who was the illegitimate child of his step-daughter, and was brought up in his household as one of his family, and might have been supposed to be his son by any acquaintance not informed of the facts as to parentage. It appears by uncontradicted evidence that the testator visited his brother's house, and observed the children there while this state of things continued, and there is nothing to suggest that he knew anything which would have corrected the mistake into which he might naturally have fallen that the boy brought up in his brother's family was his brother's son. The rules as to the reception of evidence of

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(e) [1883] 22 Ch. D. 597.

(f) [1833] 6 Sim. 1.

(g) [1881] 6 P D. 217.

(h) [1855] 1 K. & J. 528.

(i) [1844] 4 Hare 201.

(k) [1884] 25 Ch. D., p. 687.

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extrinsic circumstances stated in *Wigram on Extrinsic Evidence* and acted upon in *In re Haseldine* (l), *Forster v. Chalmers* and other cases, warrant my regarding these facts. I am satisfied to this extent that I have felt myself at liberty to give weight to the affidavits, though they contain other statements pointing to the intention of the testator to benefit the children. The question. I have to decide whether the words used in the circumstances, be held to sufficiently describe his children. The words "now living," carefully repeated, satisfy me that in using the word "son," the testator had in his mind a particular individual. He did not intend to benefit anyone but his son at the date of the will. There was no one standing in the real or apparent relation of son to his brother at the date of this boy. There was no one who could take under the will a gift if the boy the testator had seen could not, when he spoke of his brother's son now living I think he must have had no one but this child in his mind. Though there is no description by name, and the description is by reference to a relationship which in fact exist, the authorities warrant me in calling in the surrounding circumstances to determine whether the testator intended the words he used to describe a person known or a non-existent person whom he might have supposed. I think he intended the former, and therefore I hold that the legacy is effectually given, though the description of the child is inaccurate. The case is of the same kind as those referred to in *Williams on Executors*, in the note to the text which asserts that "where there is no doubt as to the person intended the misdescription of character shall not frustrate the gift." Thus a woman may take a legacy by the name of the testator's wife such a one although she be not a lawful wife if she be known or known by that name."

Conjecture that the supposed relationship might have been the motive for the gift will not deprive the legatee, in the absence of fraud, of which there is here no suggestion. See *Wilkinson v. Joughin* (n).

(l) 31 Ch. D., p. 511.

(m) L.R. 7 E. & I. App. 3.

(n) L.R. 2 Eq. 319.

I answer the questions asked by the summons as follows :—

1 and 2. The defendant William Harris takes under the words of the will, describing him as the son of James Allen, as to the right to maintenance and education out of income, and also as to the one-third share in corpus.

3. The testator did not die intestate as to any part of his property.

I direct taxation of the costs of all parties appearing, those of the plaintiff as between solicitor and client, and payment out of residuary estate.

[On 20th February 1899 an appeal by James Allen from this judgment was heard by the Full Court [WILLIAMS, HOLROYD, and HOOD, JJ.] and dismissed with costs.—ED.]

Solicitors for plaintiff: *Wisewould & Wisewould* (for *Morrissey*, Numurkah).

Solicitors for defendant Jas. Allen: *Farmer & Turner*.

Solicitors for defendant Louisa Allen: *Farmer & Turner*.

Solicitors for defendant Harris: *J. A. Wilmoth & Son*.

W. H. M.

[PRACTICE COURT.]

IN RE THE AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY LIMITED.

The Companies Act 1896 (No. 1482), ss. 77, 78, 79, and 80—Power of company to alter objects or form of constitution—Confirmation of alteration by Court.

In an application under sec. 80 of Act No. 1482 for the confirmation by the Court of alterations in the Memorandum of Association of a company, the Court will not sanction an alteration which has for its purpose merely the explaining or interpreting of existing articles.

The Court is not bound to confirm every alteration passed by the company in conformity with the provisions of secs. 77 and 78 of Act No. 1482, but the Court has a discretion and should exercise such discretion in sanctioning only such alterations which will in a reasonably substantial way enable the company to attain the object set out in sec. 80.

THIS was a petition on behalf of The Australian Widows' Fund Life Assurance Society Limited for the confirmation by the Court of various alterations in the Memorandum of Association. The alterations had been passed by special resolution of

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the society, and the provisions of secs. 77 and 78 of the *Companies Act* 1896 (No. 1482), had been complied with. 2 of the memorandum the society sought to make a change of the position of the first five subdivisions by making the fifth subdivision the first and the others to be in the same order.

The original Memorandum of Association was as follows:

- "II. 1. To grant assurances on lives joint lives and survivorships whether of members or other persons capable of contracting and whether payable either at fixed periods or at death or on contingencies involving the duration of life and to repurchase and accept surrenders of policies of assurance so granted.
- "2. To sell and grant and to purchase annuities on lives certain or on lives and whether present revenue or deferred.
- "3. To sell and to purchase reversionary and contingent interests.
- "4. To grant and to purchase endowments.
- "5. To carry on such business as aforesaid or any other lawful business connected with Life Assurance in any part of the world.
- "6. To invest in or upon Government or real property in any of the Australasian Colonies (including Tasmania and New Zealand) or in Great Britain or upon any public stocks funds or other securities of the United Kingdom or in Great Britain and Ireland or with any Insurance Banking Company carrying on business in any of the said Colonies.
- "7. To make advances to members or other persons on the security of policies issued by the Company or on the beneficial interests to which such persons are entitled under such policies with or without collateral security personal or otherwise.
- "8. To do all such other things as are incidental or conducive to the attainment of the above objects."

"III. Every member of the Company undertakes to

to the assets of the Company in the event of the same being wound up during the time that he is a member or within one year afterwards for payment of the debts and liabilities of the Company contracted before the time at which he ceases to be a member and the costs charges and expenses of winding up the same and for the adjustment of the rights of the *contributors* (contributories) amongst themselves such amount as may be required not exceeding one pound."

The proposed alterations sanctioned by resolution were as follow :—

"The following clause shall be substituted for clause 2 thereof :—

"II. The objects for which the Company is established are :—

- "1. To carry on any lawful business connected with Life Assurance in any part of the world and particularly (but without in any way restricting the generality and full effect of the above object)
- "2. To grant assurances on lives joint lives and survivorships whether of members or other persons and payable either at fixed periods or at death or on any contingencies involving the duration of human life and to repurchase and accept surrenders of Policies of Assurance so granted.
- "3. To sell and grant and to purchase annuities either certain or on lives and whether present reversionary or deferred.
- "4. To sell and to purchase reversionary and contingent interests.
- "5. To grant and to purchase endowments.
- "6. To invest the funds of the Company—
 - "(a) In any of the public stocks or funds or Government securities of the United Kingdom of Britain and Ireland (hereinafter included in the term United Kingdom) or of any colony dominion province *dependency* or possession thereof all of which are hereinafter *included* in the term 'its dependencies.'"

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[This was varied by the Court omitting the
 "dependency" and in place of the words "included in" i
 the words "described by."]

"(b) In or upon the security of city m
 borough shire or other rates tolls or dues
 when raisable or made chargeable by o
 the authority of any Act of Parliamen
 United Kingdom or any of its dependen

"(c) In or upon the bonds debentures de
 stock mortgages or securities of or gua
 by any Government public municipal
 body or authority in the United King
 any of its dependencies.

"(d) In or upon fixed deposit in any joint
 incorporated bank in the United King
 any of its dependencies.

"(e) In or upon freehold or leasehold s
 with or without movable property an
 or without chattels personal and in
 . . . lands held under conditional p
 from the Crown in the United Kingdom
 of its dependencies."

[This was varied by the Court by inserting after th
 "in or upon" in the third line of (e) the words "the securi

"(f) *In the purchase of or on the security*
 reversionary interest or any interest fo
 or lives or determinable on a life or
 real or personal property situated in the
 Kingdom or any of its dependencies an
 with or without the security of a P
 Policies of Assurance."

[This was varied by omitting the first words of the
 "In the purchase of or."]

"(g) In the purchase or in the taking on leas
 the hire from time to time in the
 Kingdom or any of its dependencies of p
 or of land which or part of which
 deemed suitable as a site or sites for p

for the use of the Company or its tenants and in building any such premises on any such freehold or leasehold land with power to resell underlet exchange or otherwise dispose of any such premises or land from time to time.

“(h) In making advances to members or other persons on the security of Policies of Life Assurance (issued by the Company) or of the beneficial interests to which such persons are entitled under any such policies either with or without collateral security personal or otherwise.

“With power for the Company to acquire by way of foreclosure or purchase the whole interest of any mortgagor or mortgagors or any other person or persons corporation or corporations in any real or leasehold or personal estate mortgaged to the Company with power also for the Company to take and to hold until the same can be advantageously disposed of any real leasehold or personal estate in satisfaction liquidation or discharge in the whole or in part of any mortgage or other debt due to the Company or in security for any debt or liability and to sell convey assign assure and dispose of all such real leasehold or personal estate as occasion may require.

“With power also for the Company at its discretion to vary or transpose from time to time any of such investments into or for others of any nature hereinbefore authorized.

“7. To acquire and undertake the whole or any part of the business property and liabilities of any Company *carrying on any business which this Company is authorized to carry on or possessed of property suitable for the purposes of this Company.*”

[This was varied as follows:—“To acquire and undertake the whole or any part of the business property and liabilities of any Company where such whole or such part so acquired

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and undertaken shall be within the scope of the objects and powers authorized by this Memorandum.”]

“8. To develop and turn to account any land acquired by the Company or in which it is interested in any manner as the directors may consider for the advantage of the Company.

“9. To obtain any provisional order or Act of Parliament for enabling the Company to carry any of its objects into effect or for effecting any modification of the Company's constitution or for any other purpose which may seem expedient and to oppose any proceedings or applications which may seem calculated directly or indirectly to prejudice the Company's interests.”

[Clauses 8 and 9 were during the argument altered and to read as one clause as follows:—“To develop and turn to account any land acquired by the Company by laying out, subdividing and selling the same and by preparing subdivisions, paving, draining and otherwise improving the same for building and letting purposes and by constructing, maintaining and improving buildings, fences and conveniences thereon. The above clause was altered by omitting the word constructing.”]

“10. To do all such other things as the Company may think incidental or conducive to the attainment of the above objects.”

[Altered to read as follows:—“To do all such other things as are incidental or conducive to the attainment of the above objects.”]

“In Clause III. thereof the word ‘contributories’ shall be substituted for the word ‘contributors.’”

Isaacs (Att.-Gen.) and *Wasley* for the society.

Cur. adv. v.

HODGES, J. This was an application under the Companies Act 1896 (No. 1482) to amend the Memorandum of Association of the Australian Widows' Fund Life Assurance Society Limited. Secs. 77 and 78 of Act No. 1482 provide certain forms

have to be gone through in order to enable a company to alter the objects of its constitution; then sec. 80 provides that the Court is not to confirm such alteration wholly or in part unless it appears to the Court that the alteration is required in order to enable the company—"(*a*) to carry on its business more economically or more efficiently, or (*b*) to attain its main purpose by new or improved means, or (*c*) to enlarge or change the local area of its operations, or (*d*) to carry on some business or businesses, 'which under existing circumstances may conveniently or advantageously be combined with the business of the company.'"

The proposal is first to amend the first five subdivisions of the second paragraph of the company's Memorandum of Association. It was proposed to alter those by placing the fifth sub-clause first with slightly altered words, and then to make the other four follow that. It was argued that the alterations would make more clear what the objects of the company were for which it was established, and would clear up the interpretation of the first five paragraphs, and would not result in any substantial alteration of the Memorandum at all. Now, the section provides that the Court is not to confirm any alteration unless it appears that the alteration is required to enable the company to do the matters I have mentioned, and I cannot find that this is any one of those matters. This is merely to interpret the articles of the company, or to make them more clear; but the section says it must be to enable the company to carry on its business more economically and efficiently, &c. Therefore, I decline to accede to this proposed alteration.

The next and the really important application was to alter the 6th of these subdivisions of the second paragraph of the Memorandum. That clause has reference to the various kinds of securities in which the company may invest its funds. It is proposed to have in clause (*a*) of No. 6 the following words:—(His Honor read the clause). This is undoubtedly enlarging the powers of investment. I think it is desirable to enlarge somewhat the power of this company to invest its funds; but I do not think it is desirable to authorize its investment in the

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securities of any "dependency" of the United Kingdom is so difficult to know precisely what may be termed "dependency," and I think it would be undesirable to authorise the investment of the funds of the company by language which would or might create very great difficulty in enabling the company to know what would be the precise limit within which it had power to invest. At the present time I could not say whether such language might authorize the investment of money in some remote province of Egypt, and consequently I think it in the highest degree inexpedient to allow the term "dependency" to remain in. This term must be removed, this being done, I think I should be acting within the limits prescribed by the Act if I allowed the suggested alteration.

The next alteration to which I think it desirable to draw attention is subdivision (e). (His Honor read the subdivision.) I think that that would be in its present form too wide, it would authorize the company to purchase land, and become to speak a speculator in land, and consequently I think that the words "in or upon" the word "security" should be added, as to give authority to invest the moneys in or upon securities of land. Although not thus permitted to purchase land, the company may, by reason of foreclosing on the land held under mortgage, ultimately become the possessor thereof.

In subdivision (f) it was proposed to ask for power to invest the money in the purchase or security of any reversionary interest, etc. In my opinion the words "in the purchase" should go out. The other proposed alterations to subdivision 7 I think should as altered be granted. Division 7 as proposed was admitted by the Attorney-General himself to be too wide, originally drawn, it was "to acquire and undertake the whole or any part of the business," etc. That required some limitation, there being a danger that the company might carry on any business which was similar to the business of this company, or also some other business, and after a time such other business might be carried on alone. An alteration must be made to restrict the business to the business that is within the scope of this company's business.

Division 8 is the next suggested alteration; this is

extensive power as it stands, and it is difficult to know what the company might do with property which it had acquired, although in one sense it might be enabling the company in some remote way to carry on its business more economically and to attain its main purpose by new and improved means—although it might in some way enable the company to do that, yet in my opinion there is a certain discretion which the Court has to exercise. The Court has authority to confirm, but I do not think it is under any obligation to confirm any resolution which is passed in conformity with the Act, and which may in some way, no matter how remote, connect itself with one of the objects mentioned in sec. 80. I think that that is the reason the Court's sanction is required—that the Court may see that it will in some reasonably substantial way do what it purports to do. It seems to me that, looking at clause 8 as at present framed it would be difficult to know what the company might not do with the land; whether it could build some complicated machinery on it with appliances for engines and really and substantially do a building contractor's business. As that seems so broad in its present form, and as I cannot say that I see it would in any reasonably approximate way attain any one of the objects which it is desired to attain I propose only to authorize that clause by altering it in the following way:—I propose to strike out one word which I was asked to leave in—viz., the word “constructing.”

In that form I propose to authorize the suggested alterations.

Solicitors for the society : *Eggleston & Eggleston.*

W. H. M.

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WIDOWS' FUND
LIFE
ASSURANCE
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December 16.

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[PRACTICE COURT.]

IN RE LOBB.

Licensing Act 1890 (No. 1111), s. 102—Transfer of license—Power of attorney to apply for transfer—Right of licensee to object to application.

A licensee by an irrevocable continuing authority appointed L. as her attorney under power to apply on her behalf for a transfer of license. L. applied for such authority in the name of the licensee and on her behalf to the Licensing Court for a transfer. The licensee, appearing by counsel, objected to such application, stating that she did not wish the transfer made. The licensee then applied for a transfer to another person. No personal objections were made to the proposed transferee of L.

Held, that the Licensing Court had a right to look into the terms of the authority given by the power of attorney, and that the fact of the licensee appearing and objecting did not oust the jurisdiction of the Court to make a transfer in accordance with the terms of the authority given by the licensee.

THIS was a special case stated by the Licensing Court of the Licensing District of Flemington-road for the opinion of the Supreme Court. The following was the case stated:—

“*Re* THE MOONEE VALLEY HOTEL, NORTH MELBOURNE.”

“On the 6th day of December 1898 the Licensing Court of the Licensing District of Flemington-road refused an application for transfer of license from M. M. Lobb, by her attorney E. Latham, to H. S. Conway, and granted an application for transfer of license from M. M. Lobb to Annie Lane. The question in question was issued in respect of the Moonee Valley Hotel, situated at Chetwynd-street, North Melbourne. Upon the hearing Mr. Cussen appeared for M. M. Lobb, through his attorney E. Latham, and for H. S. Conway, and Mr. Finlayson appeared for M. M. Lobb and Annie Lane.

“The following documents were admitted and marked as exhibits:—

“29th December 1897—License to M. M. Lobb.”

(This was followed by various notices of applications made to the Court by the various parties.)

“10th May 1897—Bill of sale containing power of attorney from M. M. Lobb with E. Latham and Son Limited.

“There was no objection by the Licensing Inspector to the application of either of the proposed transferees, and the fitness of the applicant was admitted. The license was at the time

hearing in Court, having been deposited with the application for transfer from M. M. Lobb to Annie Lane. It was admitted on both sides that there were no facts in dispute, the question being one turning on the construction and effect of the bill of sale and power of attorney above referred to.

"The following evidence was given:—G. H. Steains—I am the secretary and accountant of E. Latham and Son Limited. The grantor, M. M. Lobb, has never paid any interest, nor has she paid the principal. She is owing in addition for beer supplied. E. Latham is the managing director of the company. M. M. Lobb stated—I am the licensee of the Moonee Valley Hotel, North Melbourne. I do not support the application for transfer to Conway. I was not asked to join in such application. I saw the notice of such intended application in the *Herald* on Cup night. I was the holder of the license. No documents have been signed by me since the bill of sale.

"The majority of the Court being of opinion that the application for transfer to H. S. Conway was not made by the holder of the license within the meaning of sec. 102 of the *Licensing Act* 1890, it was decided to refuse the same, and to grant the application for transfer to Annie Lane.

"HICKMAN MOLESWORTH.

"C. L. DOBBIN, P.M.

"J. J. O'MEARA, P.M."

The power of attorney appointed Mr. Latham as the attorney of the licensee, Maude May Lobb, to apply for a transfer of the license, and the authority so given was a continuing irrevocable one.

Cussen for the applicant—Although a license is a personal license there is nothing in the *Licensing Act* which restricts the right of the licensee as to giving an authority to another person to apply on his or her behalf. The Court still keeps control over the license, and may refuse to grant the transfer on personal grounds. The licensee, however, is bound by her legal contract, and cannot now be heard to object in such a way as will effectually destroy the contract. In the case of *de Mery* (a) there was

(a) [1894] 20 V.L.R. 95.

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no such power of attorney giving a continuing authority to apply.

Counsel referred to the following cases:—*Antho*
Anderson (b); *Garrett v. Justices of Middlesex (c)*; *Carm*
Case (d).

Irvine for the licensee—A license is a personal license and cannot be transferred except in accordance with the provisions of the *Antho*
Anderson v. Anderson. Sec. 46 of the *Licensing Act 18* contains a distinct prohibition against any person holding more than one license, and the effect of allowing a contract like this to stand would defeat the obvious intention of the Act. By sec. 46 application must be made by the “holder of the license”—the licensed person—and the licensee could not contract in violation of the provisions of the Act.

A'BECKETT, J. This is a case in which the licensee of a license has executed a power of attorney, expressed to be irrevocable, constituting some person her attorney, with authority to act on her behalf for a transfer of the license. This was given for valuable consideration. The person so authorized then appeared in the Licensing Court making application for a transfer of the license by her counsel comes forward and says that she does not want this license transferred; no matter whether the authority given is valid or not, no matter whether the license is irrevocable or not, she does not want the license transferred to the proposed transferee; she wants it to go to some other person of her own name. No suggestion is made that any condition has been fulfilled under the power of attorney, or that she is acting under any misapprehension when the authority was given. It is not said that it is not a validly continuing power, but it is said that under the *Licensing Act* she can say—“I now appear before the Court, and you can do nothing without me, and I will not consent to this done.” That is the position she took up, and that is the position which I gather the majority of the Court held to be a right to take up. I think the Court was wrong. The

(b) [1887] 14 V.L.R. 127, p. 142. (c) [1884] 12 Q.B.D. 620.

(d) [1896] 2 Ch. 643.

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not require, and the decisions under the Act have held that the Act does not require, a personal appearance and a direct personal application by the licensee. There is no doubt that the license confers personal rights and personal obligations, and no matter how complete and undisputed the authority might be, any disqualification attaching to the licensee attaches equally to the person authorized by her to apply on her behalf. I do not say that none of the personal obligations required by the Act can be got rid of, but the Act recognizes and the Court recognizes the right of the person to apply under authority without the personal request of the transferror. To my mind that necessarily imposes on the Licensing Court the obligation to look into the authority of the person who comes forward and says that he is authorized to apply on behalf of a particular person. There may be cases of two rival agents, and the Court might then be obliged to say, "Send for the principal, she will settle the matter, and we cannot go on without her, and as there is a question of authority we must have her personally present." I think in a matter of that sort the duty of the Court is to look into the authority so given. In the present case the duty of the Court was this—they had before them a document which purported irrevocably to constitute the applicant as attorney for the licensee, and it was within their jurisdiction to consider whether, under the circumstances, the authority given was a continuing irrevocable authority. Mr. Irvine admits that on the facts, so far as they appear here, if the Court had been applied to to restrain the licensee, that such an injunction on the facts would have been granted. Then if the Licensing Court was to use its mind upon the matter at all it becomes a question for them to consider whether the authority was given or not, and whether it was irrevocable or not. They would find that the person appearing on behalf of the licensee was fully and irrevocably authorized to act for her. Her counsel had to admit that she herself had no right whatever; she was doing an act which the law would declare to be a breach of contract. They ought further to have said that the licensing law does not require the presence of the licensee. Supposing this authority to be, as it is, a binding

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authority which the person who gave it had no right to revoke, then there is no objection to the exercise of that authority under the Act. The licensee having authorized a person to apply, and the authority continuing, her counsel appearing and stating that she does not wish the application to be granted will not deprive the Court of its jurisdiction to transfer the license. No reason has been suggested in this case as regards any personal matter affecting the transferree or licensee. I direct that the license be transferred. The costs of this proceeding to be paid by the licensee.

Solicitors for applicant : *Fink, Best & Hall.*

Solicitor for licensee : *W. P. Forlonge.*

W. H. M.

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December 20.

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February 3.

A'Beckett, J.

[IN CHAMBERS.]

NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF
AUSTRALASIA LIMITED v. DOYLE AND OTHERS.

Will—Payment of legacies out of real estate—Pecuniary legacies, insufficiency of personality to satisfy payment of—Administration Act 1890 (No. 1060), s. 8—Act 27 Vict., No. 230—Executor—Legacy to person appointed executor—Gift annexed to office—Rebuttal of presumption—Parol evidence.

A testatrix by her will "gave and devised" to an adopted daughter the sum of £200, and to a nephew the sum of £50, and in similar words various sums to a series of legatees. The personal estate was insufficient for the payment of these legacies, but the testatrix left real estate, undisposed of by her will, which would have been sufficient to satisfy the same.

Held, that the real estate was available for the payment of the legacies.

A testatrix by her will gave a legacy in the following words :—"To John O'Sullivan my executor fifty pounds; to his daughter W. my god-daughter fifty pounds;" then followed other legacies, and then the words, "and I hereby appoint John O'Sullivan executor of this my will." O'Sullivan did not prove the will, but authorized a trustee company to apply for and obtain administration with the will annexed. O'Sullivan gave instructions for the funeral, bought land for the grave, and intended, in the first instance, to act as executor, but afterwards nominated the company to act.

Held, that assuming the legacy was given to O'Sullivan in his character as executor, he was not entitled to the same under the circumstances.

Held further, that evidence was admissible to rebut the presumption that the legacy was given to O'Sullivan in his character as executor.

An affidavit was filed deposing that the testatrix had on various occasions expressed her gratitude for services rendered by O'Sullivan, and had told him that he would find she had not been unmindful of them, and that in a prior will,

superseded by the present will, she had left him a legacy of fifty pounds, and that he was not therein appointed executor.

Held, that such evidence was sufficient to rebut the presumption that the legacy was given to O'Sullivan in his character of executor only, and that he was entitled to the same.

ORIGINATING SUMMONS.

This was an originating summons taken out by the National Trustees Executors and Agency Company of Australasia Limited for the determination of the following questions:—(1.) Are the pecuniary legacies mentioned in the will of Charlotte May Harris payable out of the proceeds of her real estate? (2.) Has the said C. M. Harris died intestate as to her real estate? (3.) Is the defendant John O'Sullivan entitled to the legacy of 50*l.* bequeathed to him by the said will, notwithstanding that he has not taken out probate of the will or acted as the executor thereof? (4.) What is the duty of the plaintiff with regard to the real estate? (5.) Is the real estate which had been mortgaged by the said C. M. Harris applicable for the payment of the mortgage debt in priority to any personal estate left by the said C. M. Harris?

The affidavit filed on behalf of the plaintiff stated that letters of administration of the real and personal estate of C. M. Harris with the will annexed had been granted to the plaintiff company. That the company had been authorized so to apply by John O'Sullivan, the executor named in and appointed by the will. The terms of the will, so far as material to this report, were as follow:—"I give devise and bequeath unto my adopted daughter K. J. T. Doyle now in West Australia two hundred pounds; to my nephew S. L. Cole fifty pounds;" then followed several further legacies to various legatees, then the will proceeded—"To John O'Sullivan my executor fifty pounds and to his daughter Winiefred my god-daughter fifty pounds." Then again followed several further legacies to other legatees, and concluded thus—"And I hereby appoint John O'Sullivan of Melbourne civil servant executor of this my will."

The testatrix at the time of her death was possessed of real estate of the value of 996*l.*, and was possessed of personal estate of the value of 65*l.* The debts amounted to 161*l.*, which

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included a sum of 150*l.* borrowed on the security of part of the real estate. The defendant Cole was sued as representative next of kin, and the defendant Doyle as representative pecuniary legatees.

An affidavit was filed on behalf of the defendant O'Sullivan stating that O'Sullivan had at first intended to act as executor, but had given directions for the funeral and bought land for a grave, but had afterwards nominated the plaintiff co-executor. The plaintiff applied for and obtained letters of administration with the will annexed. There was also a statement that the testatrix acknowledged the services rendered by O'Sullivan, and that he told him that he would find she was not unmindful of such services, and in a former will, which was superseded by the present will, she left O'Sullivan a legacy of fifty pounds, and it appeared that in such will O'Sullivan had not been appointed executor. The reading of this affidavit was objected to during the trial, but was allowed by the Judge to be read.

Higgins for the plaintiff—The question is whether the real estate is chargeable with the payment of the pecuniary legacies. In the case of *Inchiquin v. French* (a) it was decided that the real estate is the only estate chargeable with the payment of pecuniary legacies. That was the old rule, and this has been held to be still applicable in the case of *In re Cambridge*. Some argument may be raised as to the effect of the Administration Act 1890, but the effect of the consolidation of existing statutes is not to change the law in existence at the time of such consolidation. Then, as to the right of the defendant O'Sullivan to get the legacy of 50*l.*, it has been held that if there be a legacy given to a person who is also an executor, unless that person takes out probate, he cannot claim the legacy: *In re Appleton* (c).

Weigall for the defendants Doyle and O'Sullivan—It appears that in several English authorities the principle has been established that the real estate being the only fund available for the payment of pecuniary legacies.

(a) [1744] Ambler's Rep. 37.

(b) [1884] 26 Ch. D. 19.

(c) [1885] 29 Ch. D. 893.

legacies has been laid down. In England, however, an executor has no power *quod* executor to get hold of the real estate at all. If, however, even in England real estate is devised to an executor, that is enough to make the legacies payable out of the real estate. In Victoria, the executor has the legal estate in real and personal estate, and he has the same powers over the real as he has over the personal estate. (Counsel referred to *Jarman on Wills* (5th ed.), vol. ii., p. 1408.) Sec. 8 of the *Administration Act* 1890 bears out this view. By sub-sec. 5 of sec. 8 it is provided that "in all other cases such real estate shall be held and applied by the executor or administrator as if the same were personalty," so that the Act, after making provision for certain cases, clearly specifies the applicability of real estate in all other cases for the same purposes to which personalty can be applied. There is an implied direction to convert. It is difficult to see how the next of kin can claim unless this sub-sec. 5 is to apply. Act 27 Vict., No. 230, which was the first statutory provision dealing with this question, is practically to the same effect as the *Consolidating Act* of 1890, and there has been no alteration in the law. The defendant O'Sullivan has not lost his right to the legacy. Assuming that the presumption arises on the face of the will that the legacy was given to him in his character as executor, then there is evidence sufficient to rebut that presumption, and which shows that it was not given to him merely as an executor; the legacy was given to him on his own merits. Further than that, he has acted as executor.

Counsel referred to *Williams on Executors* (9th ed.), vol. ii., p. 1146.

Cussen for the defendant Cole—The defendant O'Sullivan can only take his legacy if he has acted as executor, and the facts do not show that he ever did so act. As to the question of paying the legacies out of the real estate, the general rule is that the persons entitled to the real estate are not to be deprived thereof except by express words. The mere devise to an executor is not sufficient to charge the real estate with the payment of a legacy: *Roper on Legacies* (4th ed.), p. 684; *Parker v.*

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Fearnley (d). In *Trott v. Vernon (e)* the word "devised" was used in the will, and was held to show an intention that the lands should be charged with the debts, as the testator had devised that the debts and legacies should be first paid. The consolidation of the statutes has not altered the law: *Bickford Smith & Co. v. Musgrove (f)*. By sec. 9 of Act No. 427 (now incorporated in sec. 8 of Act No. 1060) it was provided that, "subject to the provisions of this Act," the real estate was to be held on the trusts of the will, and if no will, then as if a rule to administer had been granted. Sec. 8 of the present Act does not alter the law as it then stood, and if there is no devise of the real estate it has to be distributed as if the testatrix had died intestate. If it had been intended to make real estate subject to the payment of legacies, there would have been express provision to that effect.

Counsel referred to the following cases:—*In re Hood (g)*: *In re King (h)*.

Cur. adv. vult.

A'BECKETT, J. In this case the testatrix says—"I give devise and bequeath unto my adopted daughter Kate Josephine Teresa Doyle 200*l.*; to my nephew Stanley Llewellyn 50*l.*," and gives in similar words various sums to a series of legatees. The personal estate was insufficient for payment of these legacies, but the testatrix left real estate undisposed of by her will which might be sufficient. The first question I have to determine is whether this real estate as to which the testatrix died intestate is available for payment of legacies. No charge of legacies on the realty was created by the use of the word "devise," and the case is reduced to a simple question as to whether in the absence of any charge, and after the creditors have been paid, the legatees who cannot otherwise be paid or the next of kin are to take the land as to which the testatrix died intestate. Since June 1864 real estate has been converted into personal estate for the purpose of transmission to next of

(d) [1826] 2 S. & S. 592.

(e) [1715] 2 Vern. 708.

(f) [1891] 17 V.L.R. 295.

(g) [1867] 4 W.W. & A'B. (I.) 20.

(h) [1868] 5 W.W. & A'B. (I.) 37.

kin and payment of debts; the doubt suggested is whether the conversion takes effect for all purposes, or only for the purposes expressly specified, which do not include payment of legacies. It has been contended that the effect of the series of Acts altering and consolidating the law on this subject is to substitute the next of kin for the heir, so that the claims of the next of kin would not be ousted when the heir would not have been, and that therefore the next of kin would take in preference to legatees. I cannot reconcile this view with the language of the Act in force at any stage.

The *Administration Act* 1890 now provides, in sec. 8, sub-sec. (5), that land undisposed of, as this is, shall be held and applied by the executor or administrator as if the same were personalty. Undoubtedly personalty is available in the hands of an executor for payment of legatees. It is said, however, that this consolidating Act was not intended to work any change in the law, and that the law previously in force should be considered. Looking at the first Act, No. 230, we find that under a rule to administer land such as this was, to be subject to the same laws and go and be distributed in the same manner in all respects, unless otherwise provided, as if such land had been held for a term of years and the owner had died intestate as to it. This undoubtedly would place it under the control of the person who obtained the rule, and enable him to pay legacies out of it if he were the executor. The next important change was by the *Administration Act* 1872, which vested the real estate in the executor, but provided that on intestacy it should be held on the same trusts as if a rule to administer had been granted. I fail to find any provision which, in favour of next of kin, could alter the simple position that, subject to any special provision as to priority of creditors, rights of husband and wife, or otherwise, realty undisposed of by will should be dealt with as if it were personal estate. I therefore hold that the real estate in this case is available in the hands of the executor for payment of legatees, and should be sold for the purpose of paying them.

The next point for decision is this: Amongst the legacies are the following:—"To John O'Sullivan my executor fifty pounds;

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to his daughter Winiefred my god-daughter fifty pounds." follow other legacies, and after them the words:—" And I by appoint John O'Sullivan of Melbourne civil servant executor of this my will." John O'Sullivan did not prove the will, exercise of the power given to an executor by sec. 3 of the National Company's Act he authorized the company to apply for to obtain administration with the will annexed. Is Mr. O'Sullivan entitled to this legacy? The law, as stated in *Williams v. Executors*, and affirmed in a number of decisions, is that it is presumed that a legacy to a person appointed executor is given to him in that character, and it is on him to show something to rebut the presumption. There are cases in which an executor, though he was prevented from proving the will by his own or other circumstances, had done acts as executor evincing his intention to assume the office, and was, therefore, allowed to take the legacy. The executor here gave instructions for the purchase of land for the grave, and intended to act in that capacity in this instance, but afterwards nominated the company. His nomination has been of some use, but I cannot treat him as being in the same position as the executors in the cases I have mentioned. To hold that where an executor does not prove the will, he may avail himself of statutory authority to appoint a company to act in his place he is to have the legacy which was given to him. Acting in this way would be to create a most objectionable precedent. I have therefore to see whether there is anything on the face of the will which would rebut the presumption referred to. He was the father of the godchild to whom a legacy of £500 amount was left, and is named amongst a string of legatees who were related to the testatrix, but according to the authorities this would be altogether insufficient to take him out of the presumption. The latest case cited was *In re Appleton* (i), which is a case in which the executor on this point, but raises another point which has occasioned me some difficulty. Lord Justice Cotton holds that the presumption of law referred to, that to rebut this, as in any other presumption, parol testimony may be admitted. The court refers to the effect of an affidavit filed in the matter by

(i) 29 Ch. D. 893.

ed in the evidence. Lord Justice Fry does not express
 nt, but says that he would desire further time for con-
 ation before saying definitely that he agreed. I have an
 vit stating that the testatrix had on various occasions
 ssed her gratitude for services rendered by Mr. O'Sullivan,
 old him that he should find that she had not been un-
 ful of them, and that in a will made by the testatrix
 ous to January 1897, which the present will superseded,
 ad left him a legacy of 50*l.*, and that he was not appointed
 ator by that will. There was little argument as to the
 ssion of extrinsic evidence, or the effect of the statements in
 ffidavit, assuming them to be true, and if a large amount
 involved I should be disposed to hear further argument or
 ve further evidence. I feel doubt upon both points, but
 ough to lead me to exclude evidence which such high
 rity holds to be admissible. Treating the evidence to be
 ssible, the fact that by a former will Mr. O'Sullivan was
 a legacy of the same amount, and was not appointed an
 ator, seems to me to show that in the second will the legacy
 not given him in the charactor of executor, there being
 ng to suggest any change of testamentary intention, and
 legacy in the preceding will being mere bounty. *Williams*
 s that the rule applies "where legacies are given to persons
 e charactor of executors and not as marks of personal
 rd only." From the gift in the prior will I am disposed to
 t that the legacy in the present was given as a mark of
 nal regard only, and shall act on that view. I do so
 rring to decide a doubtful point in favour of a person
 ng a meritorious claim rather than to have it reagitated at
 t which might exceed the amount involved. I answer the
 ions asked by the summons as follows :—

They are.

Yes.

Yes.

To convert it and apply the proceeds in payment of debts
 egacies, and hold the balance, if any, for the next of kin of
 testatrix.

It is.

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I direct the costs of all parties to be taxed, those of trustees as between solicitor and client, and paid out of estate of the testatrix.

Solicitor for plaintiff: *B. P. B. Rymer.*

Solicitors for defendants Doyle and O'Sullivan: *Reid Matthews.*

Solicitors for defendant Cole: *Snowball & Kaufmann.*

W. H. M.

1899
 January 18.
Hood, J.

[IN CHAMBERS.]

BEVAN v. MOORE.

Order to review—"Important question or principle of law"—*Justices Act* (No. 1105), s. 141; 1898 (No. 1584), s. 2.

The words in sec. 2 of the *Justices Act* 1898, "important question or principle of law," mean some undecided public question of law or point of importance upon which authorities differ.

Field Barrett applied *ex parte* on behalf of Alfred Edward Moore for an order *nisi* calling upon William Bevan to state the cause why a decision of justices in petty sessions at St. Kilda should not be reviewed.

Bevan issued a complaint against Moore in the St. Kilda Court for the recovery of £1 for cab hire. At the hearing of the complaint, on 13th January 1899, it was contended by the defendant that Bevan, being only an agent for the owner of the cab, was not entitled to recover in his own name the amount sued for. The justices overruled the objection, and made an order in complainant's favour for the amount claimed.

HOOD, J. Assuming for the purposes of this case that the justices were in error in the decision which they gave, and that they made a mistake in law in deciding that the complainant Bevan was entitled to recover, the applicant is then met with the contention based upon sec. 2 of the *Justices Act* 1898 (No. 1584). This section is a prohibitive one, and states that no order to review any order of any court of petty session

justices made in any complaint for any civil debt recoverable summarily shall be granted" except under certain circumstances. The first circumstance is that the amount involved exceeds 5*l*. That does not apply here. The matter involved is only 1*l*. The next is—"Unless it appears . . . that the order complained of ought to be reviewed on the ground that it involved or decided some important question or principle of law." It is contended that in this case an important question of law is involved, because the magistrates have virtually decided that an agent, known as such, can sue for a debt due to his principal. If that is the meaning of the section as contended here, and that was the decision of the magistrates, the applicant would be entitled to an order to review, but I think that such a construction would be totally destructive of the section. Every point of law is of importance to the litigant to have the law properly decided, so that if the contention is correct that the section applies whenever any question of law is involved, it would destroy the operation of the section, because it would apply to every case in which an order *nisi* could be granted. I think the intention of the Legislature was that in cases under 5*l*. a person must put up with a wrong decision, unless it appears that some important public matter of law is involved, some matter of general application, and it is not simply a case where the magistrates have erred against some well-known principle of law. If the magistrates settled an undecided question of law, then the applicant might come here, but if they made a mistake as to a well-known principle, the person aggrieved must put up with it.

There is another reason why I refuse this application, and that is that if I refuse it now there is an appeal from my decision, but if I grant the order *nisi* I shall have to decide the matter when it comes on for hearing, and then there will be no appeal. I refuse the application on the ground of that section.

Application refused.

Solicitor for applicant: *Field Barrett.*

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February 2.

REGINA v. McDERMOTT.

Criminal law—Evidence—Perjury—Finding of jury at former trial, whether misable in defence at subsequent trial.

At a trial for housebreaking and stealing prisoner swore an *alibi* and the jury acquitted him. On a presentment for perjury with regard to this *alibi*,

Held, that the jury in the trial for perjury were properly directed that they had no concern with the proceedings at the trial where the prisoner was acquitted and therefore the fact that the previous jury might have believed the prisoner's *alibi* was no defence in the trial for perjury.

SPECIAL CASE stated by A'Beckett, J.

The special case was as follows:—

Simon McDermott was tried at General Sessions on the charge of breaking into a dwelling and stealing therefrom, at Carrum, on the 5th of November 1898. His defence was an *alibi* that he was not at or near Carrum on the day in question. He supported it by his own evidence and by that of two witnesses, and was acquitted.

On the 21st and 22nd November 1898, he was tried before me on a presentment charging him with having committed perjury at the trial preceding at which he was acquitted, and at which the jury disagreed, the perjury assailing being statements in reference to his absence from Carrum on the day in question substantially the same as those which he made at the trial at which he was acquitted.

At the trial before me the evidence for the prosecution was substantially the same as that given at the trial at which he was acquitted, and the evidence for the defence was substantially the same, except that the prisoner did not himself give evidence. In his address to the jury, counsel for the prisoner insisted that as he had been acquitted on the charge of robbery the jury should have believed him, and for that reason another jury could not properly bring a verdict of guilty, which would be in effect a reversal of a previous decision by a competent tribunal. He also commented on the evidence to show that there was not enough to substantiate the charge of perjury, even if a jury were to consider and deal with it for the first time.

The Crown Prosecutor urged the jury to consider the case unaffected by what the jury had determined on the trial for robbery, and commented on the evidence.

I made no comments on the evidence, but told the jury that it was their duty to decide the case on the evidence before them, and if they had no reasonable doubt on that evidence that the accused had committed perjury they should convict him, undeterred by any view which they might suppose to have been formed by the jury which acquitted him.

After the jury had retired, counsel for the prisoner submitted that my conclusion to the jury was erroneous, on the following grounds:—

- (a) That I ought not to have told the jury that they had no concern with the proceedings at the trial at which the prisoner had been acquitted.
- (b) That I ought to have told them that as the facts in evidence were the same in both cases, the Crown was bound by the result of the former trial, and that they should acquit the prisoner; or

(c) That I ought to have withdrawn the case from the jury, having regard to the former acquittal, the record of which was in evidence. refused to recall the jury, and they convicted the prisoner.

the questions of law reserved by me for the consideration and determination of the Judges of the Supreme Court are—

1. Should I have withdrawn the case from the jury ?
2. Was my charge to the jury erroneous on any of the above grounds ?
3. Could the prisoner be rightly convicted, notwithstanding the prior acquittal on the charge of stealing ?

THOS. A'BECKETT.

ul for the prisoner—The question on which the perjury charged has already been proved in the prisoner's favour. headed an *alibi* and the jury believed him. Now on this state of facts it was not for a Supreme Court jury to be at y to reverse the decision of another competent tribunal. ed *Bacon's Abridgement*, iii., 255; *R. v. Machen* (a).

enlayson for the Crown—*Stephen's History of Criminal* vol. i., p. 297, shows that in this case the only pleas open e prisoner are *autrefois* acquit or *autrefois* convict. But rse the pleas are only applicable in a second presentment e same charge, not in a case where the crimes are house- ing and perjury respectively. The doctrine contended for lutely new.

ul in reply.

ILLIAMS, J., delivered the judgment of the Court IAMS, HOLROYD, and A'BECKETT, JJ.] This is a special case, nts reserved by A'Beckett, J. The prisoner was presented harge of perjury, when the prisoner pleaded that he was iltily of the charge. It appeared that the prisoner had, previous date, been proceeded against at the Court of al Sessions on a charge of housebreaking and stealing rrum. He was, I should say, tried twice on this e. On the first occasion the jury disagreed ; on the second on he pleaded not guilty, and went into the box, and to an *alibi* swore that he was not at or near Carrum on the f the alleged breaking and stealing. The jury then ted the prisoner. He was then tried before Mr. Justice ett for perjury, the perjury assigned being as to his

(a) [1849] 14 Q.B. 74.

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evidence of his *alibi* at the first of the two former trials, one at which the jury disagreed. Now, Mr. Paul has argued before this Court in support of the grounds which he rendered Mr. Justice A'Beckett's charge to the jury erroneous in law. These grounds are—(His Honor read the grounds.) Thereupon the presiding Judge reserved for our consideration and determination certain questions of law—(His Honor read the questions). We are of opinion that a fallacy is the basis of the argument which supports, or rather underlies, Mr. Paul's argument. It assumes that because the jury found a verdict of acquittal of the prisoner on the previous charge, they necessarily found it on the fact that the *alibi* set up by the prisoner was proved and true. That seems to me a fallacy. And if that argument is fallacious, then the whole of the contention put forward on behalf of the prisoner falls to the ground. The reason that the argument is fallacious is this: All that the jury did was to find that the prisoner was guilty, and it is consistent with that that they did so because they did not believe the evidence presented by the Crown in favour of a conviction. To support Mr. Paul's argument we must assume—we must start with the assumption—that the ground of the jury's decision was necessarily that the evidence as to the *alibi* showed it was a true plea. But there is nothing whatever to show that the jury found that. That being so, it would be properly told on this trial for perjury that they had nothing to do with the determination of the jury on the previous trial, and therefore we think that the prisoner could not be rightly convicted. Even in placing the case in this aspect we are giving the most favourable position to the prisoner, for the Crown Prosecutor has properly pointed out, the only plea which in a case like this could assist the prisoner would be "*autrefois acquit*" or "*autrefois convict*," and neither of these pleas could be pleaded here. The doctrine propounded is entirely novel to us. The conviction will be affirmed.

Solicitor for the Crown: *Guinness*, Crown Solicitor.

Solicitors for the prisoner: *Ridgeway & Irwin*.

A. F. M.

REGINA v. PETER JOSEPH BECHAZ.

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Criminal Law—Evidence—Statement by prisoner—Admission of statement of previous conduct of prisoner.

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Prisoner was presented and found guilty on a charge of incest with his daughter. Prisoner made a written statement that on a previous occasion, some months before, he had committed a grossly indecent act on the person of this daughter, and had attempted to do so on another occasion. Counsel for prisoner raised as a defence that in all the circumstances of the case it was impossible and incredible for a man to commit the offence with which the prisoner was charged.

Held, that to meet this defence the statement of his former conduct was properly admissible in evidence against the prisoner at the trial.

SPECIAL CASE stated by Williams, J.

The special case was as follows :—

The prisoner was tried before me at the last Assizes holden at Sale on the charge of incest. He was found guilty by the jury, and I sentenced him to twelve years' imprisonment with hard labour, but respited execution of the sentence until the Full Court shall have determined this special case. Mr. Maxwell, who defended the prisoner, objected to the reception in evidence of a written statement made by the prisoner when in the lock-up at Dandenong. This statement I received in evidence, and caused it to be marked "Exhibit A." It and the presentment are to be taken as forming part of this case.

Harold Henry Taylor, senior constable in charge at Dandenong, deposed that on Monday morning, the 12th of September, he told the prisoner of the charge that his daughter had made against him, and that on Tuesday morning, the 13th of September, the prisoner said to him—"Mr. Taylor, I write not good English. I want you to let Mr. Bray (another constable) write a statement for me. I want to make a statement about the charge against me." That he (Taylor) replied—"You speak bad English, so I do not like any person to write down your statement, as they might take down something you did not mean to say. I will give you pen, ink, and paper, and you can write your own statement."

That the prisoner was then left alone in his cell for over two hours, and at the expiration of that time he handed to witness the statement (Exhibit A), saying—"This is my statement which I write." The witness further deposed that the prisoner had been duly warned and cautioned in the usual way before he made the statement, and that no suggestion was made to the prisoner as to anything that was to be or was put in the statement.

The evidence of this witness was corroborated by that of another constable (Bray).

Mary Catherine Bechaz deposed as follows :—I was sixteen years old on the 2nd of October. Prisoner is my father. I have known him as such ever since I can recollect. I have been here for over seven years. I left home on the 9th of September (Friday), in the morning, after breakfast. At home I slept in bed with my mother and four younger sisters; the bed is drawn away from the wall. I slept on the wall side, on the outside. Prisoner slept in a single bed placed at the head of ours. We always slept in this way. One night before I left home (early on Friday morning) father came into my bed and had connection with me.

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Mother had gone to the kitchen to make the baby a drink. I woke when father was on top of me. This was not the first time he had connection with me; he had done it four or five times before—on the first occasion somewhere in the beginning of the year. He often asked me in the daytime if I would let him do it to me at night. I used to say no. I did not like him to do it. He said, "You do not, I will beat you." It was in consequence of what he did to me on early Friday morning that I left home.

Cross-examined.—The room I slept in is a pretty large room—not very large. I slept on the side next the wall; the bed was not drawn away far from the wall. The room was next the kitchen. One of my sisters—an elder one—slept across the foot of the bed, the other two alongside mother. My father always slept at home; sometimes he would be away for a few days from home. Once he was away from home for one month at Walhalla.

Mr. Maxwell, in his address to the jury, stated that the story told by the girl was absolutely incredible, that it was probably the most extraordinary and impossible story that the jury had ever heard in their lives. That the story told was a concoction. That it was impossible that the offence could have been committed as described by the girl. That the room was a small one, and the bed in which the offence was said to have been committed was occupied by the girl's mother and her three sisters and herself, and that one of the sisters was lying across the foot of the bed in such a position that her face would be towards the wall with this girl's feet; that there was only a canvas wall between this room and the kitchen; that the girl was lying close to the canvas wall, and that there was hardly room for a man to pass between the bed and the wall. I was strongly of opinion at the trial that the statement (Exhibit A) was admissible in evidence and might be so admitted—

(1.) As the prisoner's voluntary statement in answer to the charge—whether it amounted to a denial or to an admission of guilt.

(2.) As showing that the story told by the girl was not impossible or absolutely incredible.

The question for the opinion of the Court is whether the statement, Exhibit A, was admissible in evidence, and if inadmissible, whether the conviction should be quashed?

HARTLEY WILLIAM

19th December, 1898.

The effect of the statement appears in the judgment.

Maxwell for the prisoner—The part of the statement which deals with the charge on which the prisoner is being tried is alone admissible. There would be no end to admission of statements once they were received. A man's statement as to what he has done before is not to be used against him on a subsequent charge. The effect of such statements is only to show to the jury what sort of man the prisoner is. It may be matter for notice by the Judge after verdict, but no more admissible to the jury before verdict than would be a record of previous conviction.

Counsel cited *Reg. v. Makin and wife* (a); *Reg. v. Butler* (b); *Reg. v. Whitehead* (c); *Reg. v. Chambers* (d); *Russell on Crimes* (6th ed.), vol. iii., p. 403.

Gurner for the Crown—When the defence has been urged that it was impossible in the circumstances for prisoner to commit this offence, then a statement by the prisoner that in similar circumstances he committed practically, if not technically, the same offence, is evidence against him. Suppose on a trial for burglary it was urged that the prisoner could not, as alleged, have got through a small window in a house, then a statement by the prisoner that previously he had got through the window would be evidence admissible against him.

Counsel cited *Reg. v. Mansfield* (e); *Reg. v. Lee* (f); *Fisher v. Ronalds* (g).

Maxwell in reply.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, HOLROYD, and HOOD, JJ.] In this case we have to deal with a special case as to the admissibility in evidence of a statement made by the prisoner in answer to a charge brought against him. Counsel for the prisoner has contended that this statement should not be received in evidence, except as to one small point in it—namely, a denial of the charge made by the prisoner. I admitted the statement on two grounds—(His Honor read his reasons as set out). The presentment charged the prisoner with incest committed with his daughter on a certain date, and this statement substantially stated that on a previous occasion the prisoner had committed a grossly indecent act in the bed slept in by his daughter upon her, and had tried to commit a similar outrage on another occasion. (His Honor next described the manner in which the family slept, as set out in the evidence of Mary

(a) [1893] N.S.W. L.R. (L.) 548, at p. 551; [1894] 14 App. Cas. 57, at p. 61.

(b) [1846] 2 C. & K. 221.

(c) [1897] 23 V.L.R. 239.

(d) [1848] 3 Cox C.G. 92.

(e) [1841] 1 C. & M. 140.

(f) [1864] 4 F. & F. 63.

(g) [1852] 12 C.B. 762, at p. 766.

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Catherine Bechaz.) The prisoner stated that on a previous occasion—several months before the time of the offence which he was now prosecuted—he had gone to the bed where she (his daughter) slept, and had committed a grossly indecent act upon the person of the daughter, and also that he had tried to repeat the act on another occasion. At this time the mother and daughters were all in the room. On the present charge the circumstances are substantially the same as those admitted previously by the prisoner. The defence is that this time the mother had left the room and gone into the kitchen, which adjoined, to make some food for the baby. The kitchen was separated from the other room by a thin canvas wall, and it was difficult to pass between the side of the bed and this wall. On this state of facts Mr. Macdonald made a very forcible address to the jury, in which he stated that it was impossible for a man to have entered such a bedroom upon his daughter, and have connection with her without the mother or other sisters seeing him or hearing him, or without anyone who was out of the room hearing him brush against the canvas partition. We think that to meet that defence the statement was admissible. I told the prisoner's counsel at the trial that whatever slight doubt I had as to the admissibility of the statement before his address was removed after it. The other members of the Court agree with me that, that defence having been raised, this statement was admissible in evidence to meet that defence. We offer no opinion on the other part of the case or on any other part of the case. The conviction will be affirmed.

Solicitor for the Crown: *Guinness*, Crown Solicitor.

Solicitors for prisoner: *Madden & Butler* (for *G. H. Sale*).

A. F. M.

MATTHEWS v. THE TRUSTEES EXECUTORS AND AGENCY COMPANY
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Trusts Act 1896 (No. 1421), s. 29, sub-s. (1), sub-div. (b), and sub-s. 2—Breach of trust—Fixed deposit in bank—Reconstruction of bank—Fixed deposit in new bank—Limitation of action—Time when cause of action first accrued. November 17, 18.

A trustee company, in breach of its trust, but without fraud, more than six years before the action was brought invested upon deposit receipt for fixed periods trust moneys in a bank which while they remained so invested, in 1892, went into liquidation. In October of that year the trustee company applied for and accepted in full satisfaction and discharge of the liability of the bank in liquidation deposit receipts for fixed periods for similar amounts in a new company formed to purchase the assets of and take over the liabilities of the bank in liquidation.

Held, by the Full Court, that the transaction in 1892 was a breach of trust, and being within six years of the action being brought, the remedy therefor was not barred by reason of the *Trusts Act 1896* (No. 1421), sec. 29, sub-sec. (1), sub-div. (b).

Per MADDEN, C.J. It was a breach of trust, because it was the plain duty of the company at that time to realize the deposit receipts in the old bank, make up any deficiency out of its own funds, and invest the amount on proper securities.

Per HOLROYD, J. It was a breach of trust, because it was in effect a payment off of the old deposits, and an investment of the amount upon the deposit receipts of the new bank.

APPEAL by the defendant company from so much of the decision of A'Beckett, J., as permitted the plaintiff Ellen Elizabeth Jane Matthews to get for her life the income of the two sums of 550*l.* and 449*l.* 8*s.* 1*d.*, which had been, according to his judgment, invested upon unauthorized securities, which should be restored by the defendant company and invested upon authorized securities.

The facts and decision of A'Beckett, J., will be found reported *supra*, p. 258.

Cussen for the defendant company, appellant—The defendant company is willing to acquiesce in the decision of the learned primary Judge, except so much of it as enables one of the plaintiffs, Mrs. Matthews, to obtain the benefit of the declaration and order made in favour of the other plaintiff, her son, by taking for her life the income of the restored fund. His Honor held that she was debarred by the *Trusts Act 1896* (No. 1421), sec. 29, from obtaining relief; and yet by giving the relief

See
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which he has given in favour of the other plaintiff, he has given her the relief which she asked.

[HOLROYD, J. Is not that quite right ?

WILLIAMS, J. *Prima facie* it appears to be quite right, but I understand that there are decisions in England on it.

MADDEN, C.J. The statute does not bar the action, because you do not impeach the decision so far as it says the money is to be repaid.]

The learned primary Judge decided with us, that the statute did bar the right of action of Mrs. Matthews, though it did not bar that of the younger plaintiff, and he gave the younger plaintiff the relief, which Mrs. Matthews gets the benefit of. It is submitted that that is contrary to the express words and intention of sub-sec. 2, of the *Trusts Act* 1896 (No. 1421) (a).

[HOLROYD, J. Unless the statute interferes with it, I shall say that that part of His Honor's decision is absolutely right.]

The statute does prevent her recovering : *In re Somerset*

[MADDEN, C.J. Having a co-plaintiff, her action is not barred. The remedy for her cause of action is barred.]

[HOLROYD, J. Does not the section apply to the case of a beneficiary suing by himself ?]

It is submitted that it was meant to and does cover a case like the present, and the Court of Appeal in that case so decided. The learned primary Judge should have made an order that Mrs. Matthews should get only so much of the interest earned on the restored fund as represents interest on the market value of the deposit receipts. As put by Davey, L.J., in that case, at p. 100, the trustees are entitled to retain for their own use the income of the restored fund.

[MADDEN, C.J. If they leave the unauthorized investment on foot. But suppose the unauthorized investment brings a large income, while the market price is low, is the testant for life to lose the benefit of that income ?]

(a) Sub-sec. 2 is as follows :—“ No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he brought such action or other proceeding and this section had been pleaded.” (b) [1894] 1 Ch. 231.

The trustees cannot be asked to keep on foot the two investments. Nor did the learned primary Judge so order. Apart from the order of the Court, the trustees would be entitled at any time to get in the moneys invested on unauthorized securities and invest them upon authorized investments. The only test of the value of things is their market price.

[HOLROYD, J. Not so. You may be perfectly certain that at such and such a date the price of them will be so much, and you may know perfectly well that they will not fetch one-tenth of that now.]

If the public are so certain that it will be so they will give a larger price for them. If these deposit receipts are likely to pay a large interest the trustees will get a larger price for them, the benefit of which Mrs. Matthews will receive. But it is alleged even in the statement of claim that the bank is not and will not be able to pay interest on the deposit receipts.

[MADDEN, C.J. If the statute prevents her getting an advantage, surely she is entitled to have matters remain as they were.]

She brings an action in which she alleges that she does not want that.

[MADDEN, C.J. Is not the effect of the statute to leave her where she is?]

No—not to leave her where she is, but to bar her action. If the market value is not the real value, there ought to be an inquiry as to the real value. As the company has itself to make up the difference it will get the best price for the deposit receipts that it can. But, whether she is to have the interest on the old investment or not, it is submitted that the learned primary Judge was wrong in deciding that she was entitled to the whole of the interest on the investment of the restored fund. He has also ordered the company to pay the costs of the plaintiff Mrs. Matthews, who, according to his decision, has been beaten. There is no authority for ordering a successful defendant to pay an unsuccessful plaintiff's costs.

[HOLROYD, J. I do not see how the infant's costs of action can be separated from her costs.]

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Kekewich, J., seems to think, in *Re Somerset*, at p. 258, that they can be separated.

Irvine and *Wanless* for the plaintiff Mrs. Matthews, respondent—If this investment is not to be treated as a bad investment for Mrs. Matthews she is entitled to have it remain there.

[MADDEN, C.J. Were it not for the statute the trustee would be entitled, as Mr. Cussen says, as soon as he found that it was a bad investment to sell it, make up the difference, and invest the whole on a proper security.]

In *Re Somerset*, cited *contra*, there was no order to sell. The mortgaged property was confirmed as part of the trust estate, but the balance had to be made up by the trustees—it was an authorized investment made negligently.

[HOLROYD, J. You cannot elect to hold the security if the infant's interest requires that the whole money should be replaced. What judgment do you say ought to have been made ?]

We say the judgment of A'Beckett, J., is perfectly right.

[HOLROYD, J. If it had not been for the statute I should agree with you.

WILLIAMS, J. So should I, but the statute and *Somerset's Case* alters it.]

When His Honor ordered that all the money should be restored he deprived us of any interest that we should have got on the deposits.

[MADDEN, C.J. Before the statute the Court would have required the unauthorized investment to be sold and the balance to be made up by the trustees, but the question is whether the statute has not made an alteration. It says that one barred by it is not to get the advantage which another not barred might get. The statute takes from the former the right to complain, but it does not do away with his interest in the improper investment.]

The judgment of A'Beckett, J., was correct on other grounds. The statute did not apply, because this was a specialty debt. The company was a party to the settlement, which was under seal. Its provisions show the company was a party to a contract which amounted to more than a mere acceptance of the trusts of

the settlement, *e.g.*, there was a covenant by the trustees to invest. A breach of that makes a specialty debt: *Holland v. Holland* (c); *Wood v. Hardisty* (d).

[HOLROYD, J. The agreement is between parties other than the trustee. As a rule a trustee merely accepts the trust out of pure goodnature. There is no consideration for his doing it.]

No consideration is necessary. Even a declaration under seal that he will stand possessed on certain trusts would be sufficient: *Richardson v. Jenkins* (e); or an acknowledgment that he received the money under his hand and seal: *Gifford v. Manley* (f); or an acceptance under seal of a trust: *Wynch v. Grant* (g); *Isaacson v. Harwood* (h).

[HOLROYD, J. The parties other than the trustees seem to declare the trusts of this deed, *e.g.*, the use of the words "declared and agreed."]

Such words are sufficient to make a covenant by any of the parties who execute the instrument. It is further submitted that there was a continuing duty to invest on a proper investment, and that the not doing so was a continuing breach of trust.

[WILLIAMS, J. If it was his duty at once to put the money on a proper security I do not see the continuing breach of trust.]

His duty under the deed remained the whole time.

[HOLROYD, J. The last deposit was on 22nd March 1890. The trustees could not help the reconstruction in 1892. They were forced to it by the Act of Parliament.]

No; it was not done under the Act of 1892, which was not then passed, but under the *Companies Act* 1890, although it is included as one of the banks as to which the Act of 1892 afterwards applied, by reason of the *Reconstructed Companies Act* 1893 (No. 1546). Nor under the scheme of reconstruction was there any compulsion put upon trustees to take the new deposit receipts. There was in the scheme special provision made for those depositors who could not properly take the new deposit receipts. There was also an option given to take preference

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(c) [1869] L.R. 4 Ch. 449.

(d) [1846] 2 Coll. 542.

(e) [1853] 1 Drew. 477.

(f) [1735] Cas. Temp. Talb. 108.

(g) [1854] 2 Drew. 312.

(h) [1868] L.R. 3 Ch. 225.

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shares in place of the old deposit receipts. If they could take new deposit receipts in place of the old it might as well be argued that they could take the preference shares (i). The learned primary Judge was therefore submitted that the error when he held that the transaction of 1892 was a salvage operation, because they could have done something else under the scheme.

(i) By the scheme of reconstruction of the old bank or company referred to it was provided that the liquidator of the old company should sell to the new bank or company (which had been formed to buy its assets) all the old company's real and personal property, and that the new company should pay to him 800,000*l.* in ten payments, as follows, namely:—7 eightieth parts thereof on the 1st April in each year up to and inclusive of the 1st April 1897, and 9 eightieth parts on the 1st April 1898 and on the 1st April in each of the following years up to and inclusive of the year 1902, and should issue to such debenture holders or depositors or customers of the old company as it in its discretion might think fit preference shares in the new company in exchange for their debentures or deposit receipts or claims against the old company to the extent of at least 500,000*l.*, and should indemnify the liquidator against all claims of every description in respect of such debentures, deposit receipts, or claims against the old company, and in the event of any debentures, deposit receipts, or claims against the old company being exchanged for preference shares in the new company in excess of 500,000*l.*, the amount of such excess should from time to time as it arose be deducted from the said 800,000*l.*, and the new company might at its option, with the consent of any debenture holder or depositor or customer of the old company, take over the liability of the old company with reference to any such person's debenture or deposit receipt or claim against the old company, and

issue to any such person the debenture or deposit receipt of the new company in exchange for the debenture or deposit receipt or indebtedness of the old company, and the amount of such debenture or deposit receipt or claim so taken over should from time to time be deducted from the said sum of 800,000*l.*, and the new company should indemnify the liquidator against all claims in respect thereof respectively.

It also provided that if default was made in payment by the new company the liquidator should immediately acquire and enforce a lien or charge on all such of the property sold as had not been then realized, and it provided that the agreement should not be binding on the liquidator or on the new company unless and until debenture holders, depositors, and customers of the old company actually applied to the new company in exchange for their debentures, deposit receipts, or claims against the old company to the extent of 500,000*l.* at least, nor until debenture holders, depositors, and customers of the old company actually accepted or agreed to take the debentures or deposit receipts of the new company upon such terms as the new company might be willing to agree to in exchange for the debentures, deposit receipts, or indebtedness of the old company to the extent of at least 500,000*l.*, but it should be lawful for the new company and the liquidator to waive such portions of these liabilities on such conditions as they might jointly determine upon.

[HOLROYD, J. The learned Judge's calling it a salvage operation certainly makes it look as if he thought they could do nothing else.]

[Cussen—His Honor thought they could not do anything that was not worse for their *cestuis que trustent*.]

It was a deliberate deposit by the trustee company of the trust funds, and was a fresh breach of trust.

[WILLIAMS, J. It was the company's duty then to get as much as they could out of the wreck, and invest it in proper securities. If the company could get nothing or not sufficient it should replace the rest.

HOLROYD, J. Yes—get as much as they can, and replace the rest.

MADDEN, C.J. Really it comes to this: the trustee has by his own wrong act got himself into Scylla, and if he wants to get out of it by going into Charybdis it is his own look-out.]

There was nothing to give the trustee a right to take the deposit receipts at that time. The learned primary Judge exercised his discretion as to costs, and he had a discretion under the *Judicature Act*.

[MADDEN, C.J. Not that an unsuccessful plaintiff's costs should be paid by a successful defendant. You will find the cases show that the Court can do almost anything except that.]

There can be no appeal as to costs only.

Cussen in reply—An order such as was made by A'Beckett, J., would repeal the express provisions of sec. 29 of the *Trusts Act* 1896. What order then should be made? If the adult plaintiff is to be entitled to the income of the old deposit receipts, and the trustee company has to restore the whole fund, it would mean that the company would have to keep two funds on foot, and having paid 20s. in the pound, might eventually lose the value (12s. in the pound) of the deposit receipts. If there is anything in values, then the fair method would be to limit the tenant for life to the interest earned by the authorized investment of so much of the restored fund as represented the

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market value of the deposit receipts, and allow the company to retain the interest earned by the authorized investment of the balance of the restored fund. It is submitted that this would be in accordance with the authorities: *Bate v. Hooper* (k); *Union Bank v. Hill's Law of Trusts* (4th ed.), 557. The Court would have ordered the trustee company to sell out the improper investment and invest the proceeds upon authorized securities: *Pearce v. Guardians of Edmonton* (l); *Harrison v. Theuton* (m); the trustee company would be protected by the Court in doing when it found out it was a breach of trust: *Howe v. Dartmouth* (n). It cannot be properly urged that the trustee for life is entitled to have the old investment remain on foot as to get a larger interest. The Court would order her to refund any interest received more than should have been received by her: *Mills v. Mills* (o); *Hood v. Clapham* (p). The client is willing to accept the evidence given for the plain fact that the market value of the deposit receipts in the new law is 12s. in the pound, or to have an inquiry as to what the value is.

[MADDEN, C.J. The point we most desire to hear you on is the question of the last breach of trust in 1892.]

That, it is submitted, was not a breach of trust. It was an endeavour by the trustee company to do the best it could for the beneficiaries. That was admitted in the Court below to be the case when the defendant was about to adduce evidence to show the circumstances under which the new deposit receipts were applied for and accepted. The trustee had to save for the beneficiaries as it could. It was, as the learned primary Judge found, a salvage operation.

[HOLROYD, J. It is all very well to call it a salvage operation, but there is no proof that anything was saved by it or that the trustee company had any reasonable ground for saying that anything would be saved by it. It is a case of a person who knows the security is unauthorized going on and again and merely saying it was for the best.]

(k) [1855] 5 De G. M. & G. 338.

(l) [1883] 31 W.R. 75.

(m) [1858] 4 Jur. N.S. 550.

(n) [1802] 7 Ves., p. 150.

(o) [1835] 7 Sim., p. 509.

(p) [1854] 19 Beav. 90.

It was better than taking preference shares or waiting ten years to see if the money would be paid back.

[HOLROYD, J. There was a fourth thing that the trustee company could have done. It could have put the whole money back and placed it upon an authorized investment.]

Its not then doing so was not then a breach of trust. It ought to have done that in 1890. The breach of trust was committed then.

[HOLROYD, J. There was either a continuous breach of trust or there was a new breach of trust in 1892.]

There was a continuous cause of action from 1890, when the cause of action first arose.

[HOLROYD, J. I do not like the term cause of action—it comes from the common law, and we are now dealing with equitable rights.]

It is the term used in the cases. The defence of the *Statute of Limitations* is to be treated as if it were a plea of the statute pleaded at common law to an action for money had and received : Per A. L. Smith, L.J., in *Re Somerset* (q). Nothing the trustee company did in 1892 increased the loss. What it did minimized the loss, and the learned primary Judge so held.

[HOLROYD, J. What was done in 1892 was this:—At a particular stage it was discovered that instead of a proper investment paying interest and yielding a revenue for the tenant for life the trustee company had an investment which became entirely unproductive. An agreement was then made between the creditors of the old bank and the new bank, under which persons whose money became due immediately, in consequence of the inability of the bank to pay it off, were able to reinvest the money with another bank. It is the same thing as if they had sold the debt and reinvested the proceeds on deposit receipt with another company, and that would have been, as it appears to me, another distinct improper investment.

WILLIAMS, J. It seems to me that you must look at this in the same way as if in 1892 the trustee company had taken this money out of the Australian Deposit Bank and invested it in, say, Western Australian mines or something of that sort.]

(q) [1894] 1 Ch., p. 268.

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It did not take the money out. The trust fund did not exist. It was misinvested.

[HOLROYD, J. It cannot be allowed to take advantage of the *Statute of Limitations* by taking advantage of its own wrong, deliberately repeating its previous wrong investment. The company exchanged a debt for certain deposit receipts. It does not matter that no money passed. It was in effect getting the money out of one company and putting it upon deposit in another.]

Neither really nor substantially was money taken out of the first company. It could not be got out of it. The trustee company merely abandoned the right it had against the company which was in liquidation, for a similar but more valuable right against a company which was a going concern.

[HOLROYD, J. I think the trustee company cannot be held to say that it did not get the money out. It was its duty to have had the money, and to have had it at its disposal.]

I admit it was its duty then to repay the amount, but I say that it was not then for the first time that that duty arose. The *cestuis que trustent* had a right to have the money repaid then, but they had had that right since 1890.

[HOLROYD, J. Directly it appeared that there would be no income for the tenant for life the trustee company could have sold, and, taking out of its own pocket sufficient to make up the difference, could have invested the whole of the trust fund upon an authorized security; but instead of that the company took a new investment equivalent to the old one.]

Suppose the deposit receipts in the old bank were worthless and would not sell, could it be said that the trustee company then committed a fresh breach of trust because it did not then repay the money out of its own pocket? Or could it be said that it was then for the first time the duty of the trustee company to sell the deposit receipts, if they were worthless? It is submitted that both these questions ought to be answered in the negative. So far as the *Statute of Limitations* is concerned, this case is like the case of *Warren v. Lewis* (r), where a solicitor gave bad advice negligently, and

(r) [1896] 22 V.L.R. 410.

continued to be acted upon for more than six years, when loss occurred from following it. It was there held that the statute commenced to run as soon as the bad advice was given—not from the time when loss occurred through following it.

MADDEN, C.J. This is an appeal from the judgment of our brother A'Beckett in an action in which the plaintiffs set out that under a settlement certain trust funds were to be invested in a certain way, and the tenant for life was to have the advantage of the income during her life. The male plaintiff was the remainderman. It was alleged that on the 22nd March 1888 the defendant company in breach of trust invested a certain sum by depositing it with the Australian Deposit and Mortgage Bank Limited for two years, and on the 11th November 1889 deposited another sum with the same bank for three years. That on the 22nd March 1890, the original deposit having become due, the defendant company redeposited it with the same bank on fixed deposit for two years. Then it goes on to say "the defendant company on or about the 4th day of October 1892 further in breach of the provisions of the said indenture" (i.e., the marriage settlement) "and of the trusts thereby created applied for and accepted deposit receipts in the said new company" (the old company was in liquidation, the new company bought its assets) "for the amount of 999*l.* 8*s.* 1*d.*, payable as follows:—449*l.* 8*s.* 1*d.* in 5 years from the first day of April 1892, and 550*l.* in 5 years from the 11th day of November 1892 in full satisfaction and discharge of the liability of the said first mentioned bank (in liquidation) to the said defendant company in respect of the beforementioned deposits in the said bank, and thereby discharged the said bank from its said liability." Then it goes on to say that the deposit receipts so accepted are of less value than the sums invested would have been if properly invested according to the trusts.

The restitution of the fund is prayed by both the plaintiffs. So far as the deposits in 1888, 1889, and March 1890 are concerned, the new *Statute of Limitations*, which has been passed in this colony as an amendment to the *Trusts Act*, was pleaded as against the plaintiff. It was said that the statute had run

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against those particular investments, and that the plaintiff Mrs. Matthews had no right of action in respect of the investment. The defendant then goes on to deal with the investment in October 1892, the accepting of new receipts for the new company. As to that certain other defence was pleaded, but not the statute. The statute could not be pleaded to that if it was a breach of trust. His Honor decided that there was a breach of trust in the original deposits in 1888, 1889, and 1890, and directed the trustee to make good the original trust fund, and held that the *Statute of Limitations* had run against the female plaintiff, that therefore she was not entitled to a cause of action similar to that which the male plaintiff had; but, having directed the fund to be reinstated, for the security of the male plaintiff, the learned Judge considered the female plaintiff as tenant was entitled to the advantage of the proper investment—that there was no reason for depriving her of the income which would accrue from the proper investment of the reinstated fund, and that she was entitled to the income of the fund for her life, notwithstanding the *Statute of Limitations*. There is an appeal from so much of the decision as directs that the female plaintiff should get the income of the restored fund to the full extent, and that she was entitled to the income of only so much of the fund as would represent the market price of the deposit received representing the investment. We think A'Beckett's, J., decision was right, but for reasons different to those which commenced themselves to him. We think it probable—we offer no opinion on the other matters—but we think that if the investments referred to in paragraphs 8, 9, and 10 of the statement of claim made in 1888, 1889, and 1890 were only to be regarded as investments, the statute would probably apply—that its effect would be to deprive the female plaintiff of at least the full amount of the interest arising from the restored fund. For some reasons which were to A'Beckett, J., sufficient, he thought she was not entitled. But before us it has been pointed out that the transaction which arose in 1892 by which the trustees, in

of realizing the fund when the old bank got into difficulties and subsidizing it by moneys of their own, as was their plain duty to have then done, entered into an entirely new transaction. They took the receipts of the new bank for longer periods in discharge of the old bank, and did, in fact, discharge the old bank. We think that was an effectual dealing with the funds of the estate—in this way—that they could have followed the funds and that they took on themselves there and then the further misuse of the fund instead of restoring the fund—getting what they could out of the old bank, and making up the balance out of their own pockets. It was intended to be an operation effected with the trust funds, and we think that was a transaction for which the female plaintiff might have complained apart from the others altogether. We think if she made that alone her charge she might succeed on it. That being so, manifestly the breach of trust did not fall within the statutory period, and it is not pleaded against it. Therefore on that ground we think His Honor's judgment is right in directing not only that the fund be restored, but that the life tenant be entitled to the proceeds of its investment during her life. Appeal will be dismissed with costs.

That also disposes of another point which was raised, that A'Beckett, J., had no jurisdiction to order the successful defendant to pay the unsuccessful plaintiff's costs. By this judgment she is successful.

As to the other point, that the judgment of A'Beckett, J., should be varied on the ground that the tenant for life was entitled only to the product of so much of the restored fund as would be equivalent to the value of the misinvested fund, we abstain from commenting, because in our opinion it is not necessary to consider it in this action. As to the other point, whether or not this amounted to a specialty debt, we offer no opinion, because it is unnecessary.

WILLIAMS, J. If this was a breach of trust in October 1892, as I think it was, when the trustee company changed deposit receipts in the old company for deposit receipts in another new company of equivalent value—equivalent in amount—if that was a breach of trust, the statute would

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only begin to run against the female plaintiff from that and as six years would not have elapsed between that and the commencement of the action the statute is not as against her, and if it is not she is in precisely the position as to relief as the infant plaintiff. In that the judgment given by A'Beckett, J., is right.

HOLROYD, J. I desire to offer no opinion on any of various points in this case, except one which is sufficient to uphold the judgment given by the learned Judge—that is, the transaction in 1892 was a repetition of a previous improper dealing with the trust moneys. In the first instance trust money was placed on deposit with a bank without authority, and it were an investment and an authorized investment. In the debt due to the trustee as such by the company with which the money has been deposited was virtually paid off by the company, who gave certain deposit receipts of their own, constituted themselves the debtors of the trustee. That was a new transaction in which the trustee purported to be investing these moneys as if it were an investment and an authorized investment. For that reason I think there was a new breach of trust in 1892, and that being so the statute creating this limitation of suing does not apply.

Solicitors for defendant company, appellant: *Davies & Campbell.*

Solicitors for plaintiffs, respondent: *Lamrock, Brown & Hall.*

A. J. A.

KIRBY v. THE VICTORIAN RAILWAYS COMMISSIONER.

Practice—Trial by jury—Evidence—Nonsuit—Action for negligence—Onus of proof.

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March 3.

Where the circumstances adduced in evidence by the plaintiff in an action for negligence are, in the absence of direct proof of negligence, as consistent with the injury being caused by his own negligence as with it being occasioned by the negligent omission of the defendant, the plaintiff fails to satisfy the onus of proof upon him, and should be nonsuited.

Wakelin v. London and S. W. Railway Co. (12 App. Cas. 41) applied.

Per HOOD, J. The rule that a railway station must be so lighted that persons lawfully thereupon may be in reasonable safety applies only to such persons, and does not extend to persons outside the premises.

APPEAL from the County Court.

The facts and arguments may be sufficiently collected from the judgment of Williams, J.

The appeal was heard by the Full Court, consisting of Williams, Holroyd, and Hood, JJ.

McArthur for the plaintiff appellant.

Box and Cussen for the defendant respondent.

Cur. adv. vult.

The following judgments were read :—

WILLIAMS, J. The plaintiff's daughter, who had a return ticket from Pakenham to Melbourne, was proceeding to Pakenham station in order to return to Melbourne by the night train. The night on which she was killed was an extremely dark one, and she had only been to Pakenham on two or three occasions before. The approach to the station was fenced, but there was no light to indicate or make manifest the approach. A high road led to this approach, and continued on past it down to and crossing the railway line. This high road was also fenced. It crossed the line by what is known as an open crossing, with cattle pits immediately adjacent to either side of the crossing. This crossing, like the approach, was also not lighted, and this crossing was distant from the approach only 33 yards—99 feet. The station was lighted to a certain extent, but anyone going in the direction of the station from the house which the plaintiff's

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daughter on the night in question left would be unable to see these lights, as they would be obscured by the cool storage shed. These station lights, however, threw a strong light on to the side of the goods shed, which was on the opposite side of the line. The plaintiff's daughter was killed by a train of the defendant's apparently at a point on the line close to the open crossing. It appears to have been caught by an incoming train either at a cattle pit nearer to the station, into which she may have fallen, or at a point immediately beyond it, inasmuch as traces of blood were found commencing at a point two feet from the cattle pit and nearer to the station, continuing to where the body was found. On these facts the plaintiff brought an action against the defendants, but was nonsuited by the Judge of the County Court on the ground that there was no evidence to go to the jury that the daughter's death was occasioned by any act of negligence on the part of the defendants for which they could be held liable. From this decision the plaintiff has appealed, and we have now to decide whether that nonsuit was right or wrong.

Counsel for the plaintiff urged that there was an alternative approach to the station—namely, that along the line—within a very short distance of the legitimate approach, and as that approach was dangerous it became the duty of the defendants to light either the one approach or the other, if the jury came to the conclusion that the approach which was dangerous was close to the one that was not that on a dark night a person coming had a right to go to the station might reasonably mistake the one for the other.

This proposition may or may not be correct. Personally I am inclined to think it is. If a station may be approached by two of two underways close together, and one is in a hazardous or dangerous condition, I think it would be the duty of the railway authorities to indicate in some way which approach is safe and which is dangerous. But it is not sufficient for the plaintiff to establish this proposition. To defeat this nonsuit she must establish that there is evidence fit to be submitted to a jury that the death of her daughter was caused by the negligent act or omission of the defendants. This it appears to me she has failed to do.

Counsel for the appellant has pressed upon us that there was evidence to go to a jury that the deceased, who was a comparative stranger to the locality, when endeavouring to go to the station by the regular and legitimate approach, on account of darkness not being able to see that approach, and misled by reflected light on the roof of the goods shed, followed the road which led to the approach further on till she struck a level crossing, and that then seeing the station lights she went along the line in mistake for and thinking it was the regular approach, and that then she either immediately stepped on and fell into the cattle pit or was caught by the incoming train before she discovered her mistake, and that she made this mistake or blunder in consequence of the negligent omission of the defendants. But assuming that on account of the propinquity of the two approaches there was evidence of negligence to go to the jury on the part of the defendants in not lighting one or other of the two approaches—where evidence fit to be submitted to a jury that by reason of this negligent omission on the part of the defendants the deceased came by her death. I think there is not; for, admitting the possibility of the theory as to the cause of death advanced by counsel for the plaintiff, it is equally possible that having passed the regular approach, and having reached the crossing she deliberately elected, instead of retracing her steps, to go along the line towards the station in order to catch her train. If this be the fact the defendants would of course not be liable, and the evidence is quite as consistent with this being the fact as it is with the state of facts propounded by counsel for the appellant. The plaintiff has to prove that the deceased's death was occasioned by the negligent omission of the defendants. If in her endeavour to do this she adduces in evidence facts which are as consistent with the deceased's death being caused by her own negligence as with her death being occasioned by the negligent omission of the defendants the plaintiff fails to satisfy the onus of proof which the law casts upon her and she is properly dismissed: *Wakelin v. L. and S. W. Railway Co.* (a)

In that case Lord Halsbury in delivering the judgment of the

(a) [1886] 12 App. Cas. 41.

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House says:—"If, in the absence of direct proof" (these material words) "the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very reason that the plaintiff is bound to establish the affirmative proposition—*Ei qui affirmat non ei qui negat incumbit probatio.*" And further on in the judgment he says:—"It is manifest that the plaintiff who gives evidence of a state of affairs which is equally consistent with the wrong of which she complains having been caused by—in this sense, that it could have occurred without—her husband's own negligence as with the negligence of the defendants does not prove that it was caused by the defendants' negligence." For the reasons I have stated I think the nonsuit was right, and that this appeal should be dismissed, with costs. I am requested by my brother Hood to state that he concurs in this judgment.

HOOD, J. In order to succeed in this action the plaintiff must establish some negligent act or omission which substantially brought about her daughter's death. She had to give evidence which if believed would justify the conclusion that the defendant or his servants had violated some duty owing to the deceased and had thereby brought about the injury complained of. I think that she has not succeeded in doing this. It was argued that as the cattle pit was near to the entrance, there should have been a light on either or both. Now as to the lighting of the gateway, a railway station like any other business place must be so lit up at night that persons lawfully there may be in reasonable safety. But this only extends to those actually on the premises. The plaintiff's contention is that the entrance should be so lighted as to be easily found by strangers outside the premises. If so the occupier of an ill-lit house would be liable for injuries caused by an obstruction in the road placed there, another if the person injured had been lawfully seeking the house and in looking for it had fallen over the obstruction. This cannot be right. If it were every man would be compelled to hang out a lamp in front of his door—an obligation not imposed on householders. Then it was argued that the

pit should have been lit. Against this it was correctly pointed out by Mr. Box that the owner of property, upon which is a dangerous excavation alongside the highway, owes a duty only to persons passing along that highway who are injured by accidentally falling in. Here there is nothing to justify the supposition that the unfortunate young lady, intending to pass along the highway fell into the pit, but everything tends against such a conclusion. The case was then presented in another, and a much more impressive way. There are two openings in the station fence somewhat alike, and within a short distance of one another, one safe and the other dangerous, and it was contended that it is a question for a jury to decide whether some precaution should not have been taken to prevent mistakes, and to enable passengers at night to distinguish between them, especially having regard to the effect of the lights at the station. The answer, however, seems to be that there is no evidence of any mistake. The body of the deceased was found on the lines—a place where *prima facie* she had no right to be—and it is all conjecture as to how she came there. The plaintiff puts it that the deceased had turned in at the cattle-pit opening in the belief that it was the proper roadway; but the evidence is equally consistent with the view that when she arrived at the rails she knew by the appearance of the ground that she had passed the gate, but, fearing that she might miss the train, turned off to make a short cut, in ignorance of the existence of the cattle pit. Evidence such as this establishes neither case, and the plaintiff, on whom the onus of proof rests, must fail: *Wakelin v. L. & S. W. Ry. Co.* (b). The nonsuit, therefore, in my opinion was correct. I prefer to express no conclusion as to the liability of the defendant even if the mistake had been established.

Appeal dismissed.

Solicitors for the plaintiff: *Gillott, Bates & Moir.*

Solicitor for the defendant: *Guinness, Crown Solicitor.*

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(b) 12 App. Cas. 41. •

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IN RE THE MURRAY RIVER STOCK, STATION, AND COMMISSION
AGENCY COMPANY LIMITED.

1899
February 3.

*Company — Winding up—Voluntary liquidation — Mortgage — Interest
covenant—Companies Act 1896 (No. 1482), s. 153.*

A' Beckett, J.

A trading company executed an instrument of mortgage to secure moneys owing by the company, and by a covenant in the deed agreed to pay interest at a certain rate. During the currency of the mortgage the company went into voluntary liquidation. The mortgagee claimed interest accruing to the date of the winding up.

Held, that the claim could not, by reason of the provisions of sec. 153 of the Companies Act No. 1482, be allowed.

In re the Irrigable Estates Co. Limited (23 V.L.R. 477) approved.

SUMMONS on behalf of the liquidators of the Murray River Stock, Station, and Commission Agency Co. Limited for determination of the following questions in the winding up of the company :—

1. Is the Australian Joint Stock Bank Limited entitled to rank for any, and if so what sum for interest in respect of the period since the commencement of the winding up of the company upon moneys due to it at the date of the commencement of such winding up.

2. Is the bank entitled to rank as a creditor for any sum should any dividend be paid to it in respect thereof by the liquidators.

The Murray River, etc., Co. went into voluntary liquidation on 11th September 1893. Upon that date the Australian Joint Stock Bank Limited was a creditor of the company and was holder of two mortgages over certain property of the company to secure the amount due upon two accounts opened by the company with the bank. The first of these accounts was an overdrawn account for 3,448*l.* 11*s.* 5*d.*, and the other a "past bills" account for 3,261*l.* 9*s.* 5*d.* There was a covenant in the mortgage deed securing the interest. The sums appearing to be due to the bank upon its books at the date of the commencement of the winding up were paid to the bank by the company. The bank now claimed interest upon moneys owing to it by the company at the rates provided for by the mortgages. Whereupon the present liquidators issued a summons to determine the questions set out above.

Weigall appeared for the liquidators.

Mitchell for the Australian Joint Stock Bank Limited.

Cur. adv. vult.

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A'BECKETT, J., read the following judgment:—This is a summons to determine a question arising in a voluntary winding up as to the right of a creditor to prove for interest accruing since the commencement of the winding up. Sec. 153 of the *Companies Act* 1896 repeals the old rule on the subject, and enacts that “after the passing of this Act no interest in respect of any period subsequent to the commencement of the winding up of any company shall be computed charged or payable on any debt or claim due from the company and allowed in the winding up.” On behalf of the creditor it has been argued that the section should be held to apply only to insolvent companies, and that injustice would arise if solvent companies were enabled to get rid of their obligations to pay interest by going into voluntary liquidation. It is alleged that taking into account its uncalled capital the company is solvent. A similar attempt to avoid the literal interpretation of the section was made in the case of *In re the Irrigable Estates Company Limited* (a), before Williams, J., who decided that the effect of the section could not be restricted in the manner contended for. After consulting the authorities referred to in argument before me I have come to the same conclusion. If I were disposed to consider that some qualification should be implied I should be at a loss to know how that qualification should be expressed. If it were to be read as confined to insolvent companies it would need some definition to exclude doubt as to how uncalled capital was to be regarded in determining insolvency. If it left the right to interest unaffected with regard to solvent companies it would also need some provision regulating the right to interest as between the different classes of creditors who were dealt with by the repealed rule 22. The absence of any such provision supports

(a) [1897] 23 V.L.R. 477.

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the view that the abolition of the right to interest was intended to be general. I hold that the right to interest is negative of the section as against the creditor in this case. The words "after the passing of this Act" do not leave the right to interest unaffected up to the time of the passing of the Act as if the section had run—"No interest subsequent to the commencement of the winding up and to the passing of the Act shall be computed and allowed." I hold that the effect of the words is to prohibit the computation or allowance after the passing of the Act of any interest after the commencement of the winding up of the company.

I therefore answer the question asked by the summons as follows:—"(1.) The A.J.S. Bank is not entitled to rank as a creditor for any interest in respect of the period since the commencement of the winding up of the company upon monies due to it at the date of the commencement of such winding up."

I allow the liquidator his costs of this application out of the assets.

Solicitors for the liquidators: *Blake & Riggall.*

Solicitors for the Australian Joint Stock Bank Limited: *Moule, Hamilton & Kiddle.*

R. H. C.

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 February 9.

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[PROBATE JURISDICTION.]

IN THE ESTATE OF JOHN SYMONS, DECEASED.

Infant — Maintenance — Administration — Share — Corpus — Moneys already expended — Order — Attendance by counsel — Certificate — Costs.

Moneys already expended by an administrator in the maintenance of the children of the intestate may be repaid the administrator out of the income of the shares in the estate.

APPLICATION in Chambers under sec. 19 of the *Trusts Act* 1896, 59 Vict., No. 1421.

John Symons, of St. Kilda, grocer, died on the 23rd of August 1896 intestate, leaving a widow and two infant female children. Letters of administration were on 29th August 1896 granted to the widow, Mary Amelia Symons. The total value of the estate

was 277*l.*, and the balance for distribution after payment of the funeral and testamentary expenses was 217*l.* There were no debts owing by deceased at the time of his death. The widow, on 21st June 1898, married one Henry Matthews, a stationer. The share of the widow, amounting to 72*l.*, had been taken by her, and the balance, a sum of 145*l.*, was lodged in the hands of the two sureties in the administration, who deposited it in their joint names in the Melbourne Savings Bank. Since the father's death the children had lived and were now living with their mother. The income from the sum of 145*l.* was stated by her to be and to have been insufficient to provide for their maintenance, and she had in consequence drawn from the capital sum in order to reimburse herself in part for the children's maintenance. Her drawings were :—On 17th September, 15th October, and 6th November 1896, 5*l.*, 2*l.*, and 6*l.* respectively; on 13th February and 4th September 1897, 8*l.* and 6*l.* respectively; and on 2nd February, 7th May, and 22nd June 1898, 6*l.*, 8*l.*, and 6*l.* respectively, or a total of 47*l.* in all, and was expended by her upon the children's maintenance, leaving a balance in the Savings Bank of 100*l.* Mrs. Matthews was entirely dependent on her husband for support. The actual amount expended by Mrs. Matthews for the support of the two children amounted to 63*l.*, and there was still owing to her the sum of 16*l.* She estimated the necessary yearly expenditure for each infant's maintenance to be 13*l.* Application was in the first instance made by Mrs. Matthews to Hood, J., in Chambers, for the authority of the Court to apply the sum of 13*l.* a year out of each infant's share and the income thereof in and towards her maintenance, and for an order indemnifying her for having already expended the sum of 47*l.* out of the capital of the estate in the maintenance of the children. Hood, J., adjourned the application in order that affidavits might be filed showing that the moneys drawn by the administratrix from the infants' shares were expended on their maintenance, and showing that the present husband of the administratrix was unwilling to maintain the infants.

The application was now renewed upon affidavits setting forth these further facts, but these affidavits had been sworn before a

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Commissioner of the Supreme Court of South Australia, w
the administratrix and her husband resided.

W. Lewers for the applicant—In *Ex parte Welch* (a) maintenance was granted; *Simpson on Infants* (2nd pp. 308, 312; and *In re Hodges, Davey v. Ward* (b).

A'BECKETT, J. I make the order as asked. The order be that the sum of 13*l.* per annum be allowed for the maintenance of each infant, as from a date to cover the 47*l.* already expended, and as to the future the applicant will be authorized to expend a sum not exceeding 13*l.* per annum from the share of each infant for her maintenance. The additional affidavits better be filed for what they are worth. They answer inquiries made by Hood, J., and they satisfy me. To a taxation of costs, I generally fix an amount. I shall, therefore, allow the applicant 4*l.* 4*s.* as the costs of this application, 2*l.* 2*s.* of which is to be deducted from and paid out of the share of each infant. I think this was a proper application to be attended by counsel, but I do not make the ordinary certificate because, as I have fixed the costs, I think it unnecessary.

Application granted

Solicitors for applicant: *A'Beckett & Chomley*.

R. H. C.

(a) [1854] 23 L.J. Ch. 344.

(b) [1878] 7 Ch. D. 754.

[PRACTICE COURT.]

DAVIDSON *v.* DARLINGTON.TAYLOR *v.* THOMPSON.BRITT *v.* ELLIS.1899
February 22.Holroyd, J.

Police Offences Act 1890 (No. 1126), s. 41, sub-s. 12—Justices Act 1890 (No. 1105), r. 18—Suspected person—Frequent—Place of public resort—Railway station—Practice—Evidence—Admission—Separate information—Trial.

Three persons against whom separate informations were laid in respect of the same offence were tried together and convicted. The evidence against each defendant was the same. There was nothing to show that any injustice was done.

Held, following *Regina v. Sturt, ex parte Ah Tuck* (2 V.L.R. (L.) 103), that the court of petty sessions was not acting illegally in trying the prisoners together.

Hearsay evidence of a felony may be admissible in order to show that an accused was a suspected person.

That a railway station is a place of public resort within the meaning of sec. 41, sub-sec. 12 of the *Police Offences Act 1890* may be a matter of evidence.

Moving about a place and again and again attempting to commit a felony constitutes "frequenting" within the meaning of the sub-section.

ORDERS TO REVIEW.

John Darlington, Frank Ellis, and Arthur Thompson were charged upon separate informations sworn by separate informants at the Court of Petty Sessions, Bendigo, on 31st December 1898. The charges were heard together. The defendants were unrepresented by counsel. Each information set forth "for that he (the accused) on the 24th day of December 1898 at Bendigo being a suspected person did frequent a place of public resort with intent to commit a felony." The justices convicted the defendants and sentenced each of them to be imprisoned for a period of eighteen months, with hard labour, and ordered each of them to pay 1*l.* 14*s.* for costs of trial. An order *nisi* to review each conviction was obtained on grounds which, together with the facts, are set forth fully in the judgment.

A. E. Jones to move the orders absolute.

G. A. Maxwell for Davidson.

W. H. Williams for Britt, and J. Fisher for Taylor to show cause.

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The following authorities were referred to during argument—*Regina v. Muir* (a); *Regina v. Sturt, ex parte Ah Tack*; *Justices Act* 1890, rule 18 (c); *Mason v. Maas* (d); *Clarke v. The Queen* (e); *Kisby v. Jenkins* (f); *Whitney v. Wilson*; *Regina v. Leoni* (h).

HOLROYD, J. In the case of *Davidson v. Darlington* accused, Darlington, was convicted by the Court of Criminal Sessions at Bendigo on the 31st December last under sec. 41, sec. (12), of the *Police Offences Act* 1890. The charge was being a suspected person he frequented a place of public resort with intent to commit a felony. The offence was laid as having been committed on the 24th December 1898 and at Bendigo. An order *nisi* to review this conviction was obtained on several grounds. The first of these grounds was that, as there was a separate information against him, the defendant should not have been tried with Thompson and Ellis, against whom there was in each case a separate information laid and signed. A separate information had, as a matter of fact, been laid and signed against each of two other persons—namely, Arthur Thompson and Frank Ellis—and by different informants; but the informations charged them with having been guilty of precisely the same offence, and the evidence afterwards taken was such as to show that if any of these defendants were guilty of the offence alleged against them they were guilty of it.

It appears that in the case of *Regina v. Muir* (i) persons against whom separate informations had been laid were tried together, and it was held, although precisely upon

(a) [1896] 2 *Argus* L.R. Current Notes 322.

(b) [1876] 2 V.L.R. (L.) 103.

(c) *Justices Act* 1890:—"Rule 18. A complaint may be made or an information laid and a summons may be issued thereon, against two or more persons liable or chargeable whether jointly severally or in the alternative and orders or convictions may be made

against such one or more of persons as the justices may find liable."

(d) [1895] 17 A.L.T. 12.

(e) [1884] 14 Q.B.D. 92.

(f) [1898] 23 V.L.R. 648.

(g) [1898] 24 V.L.R. 574.

(h) [1895] 18 V.L.R. 469.

(i) 2 *Argus* L.R. Current Notes 322.

ound I do not feel quite sure from the report, that the con-
 tion in each case was bad, inasmuch as the defendants ought
 to have been tried together. In a very much older case of
Regina v. Sturt, ex parte Ah Tack (k) there were three accused
 persons against whom separate summonses had been issued tried
 together, and it was held that they were properly so tried. They
 were convicted together for the commission of the offence
 with which they were charged. It was held by the three
 judges—Stawell, C.J., Fellows and Stephen, JJ.—that they
 could be tried together, and that this was perfectly lawful. I
 have not been referred by counsel on either side to any Act of
 Parliament or to any authority showing how the procedure before
 justices in such a case is regulated. Who is to regulate it? It
 was contended before me that the defendants had a right to be
 tried separately. On the other hand it is said that no injustice
 was done to them by trying them together, and there was no
 ground shown upon which the alleged right could be based. I
 suppose, if the practice before justices is not regulated expressly
 by statute or by some authority binding upon me, I must take
 that where no injustice is done the justices have a dis-
 cretion with regard to the cases tried before them, and are at
 liberty to determine the procedure. There is an indication in
 rule 18 of the rules under the *Justices Act 1890* that it was
 intended that prisoners might be tried together or separately
 where the offences were separate. That rule does not say in so
 many words that such is the case, but it says in effect
 that where persons have been guilty of separate offences the
 informations may be laid against them jointly. If that is a
 valid rule it indicates that there must be power to try
 together persons charged separately if no injustice will be
 done. But still it does say that in such a case the informa-
 tion ought to be laid jointly. Now I have to consider
 whether what has been done here is legal or not. I cannot
 say it is illegal, but I can say that no possible injustice
 has been done to these prisoners by trying them together
 the judgment of the Court in *Banco*, in *Regina v. Sturt*, binds

(k) 2 V.L.R. (L.) 103.

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me. I should feel the greatest doubt with regard to my own determination after the contrary decision by Hood, J., had been given; but it does not appear that his notice was called to the case of *Regina v. Sturt*. If that had been done, there would probably be some reason or expression in his judgment showing why Hood, J., came to the contrary conclusion. I therefore think that this ground fails.

I had more doubt with regard to the improper admission of evidence. The evidence objected to was that of Constable Hayes and of Miss McKeown. Hayes repeated a statement made to him by McKeown concerning a robbery which she said had been committed, and in which certain money and certain deposit receipts were stolen from her person; and also a statement of McKeown, who gave some further details respecting the supposed robbery. I am inclined to think that the evidence is admissible, in order to show that the accused in the case was a suspected person. Information was given to the police of this robbery, or that in fact some robbery had been committed. On pursuing their inquiries the police discovered that these three accused had been seen together in various positions which indicated that they were jointly or in concert engaged in endeavouring to commit various robberies, and at the same place and for the same period of time. The fact of one robbery having been in fact committed and reported to the police in conjunction with the fact that these persons had been seen trying to commit robberies together is evidence of these persons having been suspected. That fact is brought home to the mind of the police and gives grounds to the suspicion. I do not think a person can be picked up at a railway station and suddenly brought up as a suspected person unless there is some reasonable ground assigned for it. I have to find out who is a suspected person. The *Police Offences Act* does not say who he is, or of what he must be suspected. The best evidence of the suspicion would be that a felony had been committed, that the person accused was connected with that felony, and that this fact was brought to the knowledge of the person who charged him with the offence, a part of which is being a suspected person. For that reason I think the evidence is admissible.

As to the third ground—(His Honor read it)—that there was no evidence that the Bendigo railway station was a place of public resort or was used as such. Now there is abundant evidence that at the time when the accused were alleged to have committed the offence with which they were charged, or during the period over which that offence must be spread, the Bendigo railway station was in fact resorted to by the public in crowds—that is the evidence—and without any opposition on the part of the authorities. Trains were coming in and going out, and people were allowed to go upon the station for various purposes. The crowd was not restricted by any means to people who desired to travel by the railway. It is a matter almost of history that persons are allowed upon railway stations even although they are not travellers by the railway; but of that fact there is evidence here, namely, that the Bendigo railway station was at that moment resorted to by the public—that is to say, was a place of public resort, and no hindrance was offered by the authorities. So that I think within the meaning of sec. 41, sub-sec. 12, the Bendigo railway station is a place of public resort. The fourth ground of the order *nisi* was that no evidence was given that the defendant frequented the Bendigo railway station. “Frequented” is a word which it is a little difficult to interpret, but it must be remembered when trying to interpret it here that what I have to decide is whether there is any evidence of frequenting on the part of the defendant. The defendant Darlington goes down on Friday night to Bendigo by the train. He is seen in the evening at the railway station. He is at the station, and what is he doing there? Unless it is for the purpose of some idle amusement or of committing some offence there is nothing to show. He was not there with any object of continuing his journey. According to the evidence of McLennan he has come down to Bendigo. He is seen with the two other accused who were tried along with him, and against whom separate informations were laid, near the ticket office. He did not want a ticket. He had got a ticket to Melbourne. He then gets before a woman and blocks her. He stands in that position for a few minutes, then goes towards the Coffee Palace, and the three go away together. This is the first visit to the

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station. Darlington may have been there on previous occasions but this is the first of which there is evidence. At 10 o'clock the following morning McLennan is on the platform when the up-country trains come in. He hears the Echucan whistle. The three accused run over the bridge to the Queen's Hill platform. McLennan says:—"I stood on the bridge waiting for them and drew the attention of a young man to them. I saw a woman come out of one of the trains. She had a parcel under her cloak with her. Just as she was coming out of the gate I saw the ticket office, which was very crowded at the time, and the three accused walk in front of her and the other two prisoners walked behind her. The three then met and walked over the bridge. I drew the attention of Alfred Strode to them." Strode says:—"At about 11 o'clock on Saturday the 24th December 1898 I was at the Bendigo railway station. My attention was drawn to the three prisoners by McLennan. I saw them enter the ticket office twice where there was a crowd. I saw Darlington in front of several females and Ellis and Thompson behind. I did not see them get any tickets. They would follow the crowd. After the Kerang train went away the three prisoners walked along the platform, in and out of the crowd. I saw Thompson say to Ellis, 'Did you get it in all right?' Ellis replied, 'Oh, yes! I got it in all right.' They then went to a closet, remained there a few minutes, and walked towards the city." So that the accused performed the same trick twice. He goes on—"I then heard a woman reporting to Senior-Constable Hayes about having her pocket picked. I then went to a closet and in one of the compartments found portions of a deposit receipt. Constable Davidson then came up and we found the purse and receipts produced. That purse and receipts were subsequently identified as belonging to McKeown, and there was evidence to connect the prisoners with the robbery committed upon her. Now, the best evidence in my opinion of intent to commit a felony is that the three accused actually committed it. There is very strong evidence that the three accused persons did commit this felony. There is evidence independent of that of their having gone about with intent to commit a felony; by doing that, did they free

this place? The evidence points to the fact that the offence was committed not only once or twice. What they did was to make an attempt upon several people in the same way within a comparatively short space of time, and again and again. They were upon the station for the purpose, as it seems to me, of committing as many felonies as they could within the limited time. I call this "frequenting" the station for the purpose of committing a felony. The time they stayed on the spot may be long or short, but a felony may be committed in a minute as easily as in five hours. I cannot think that they must necessarily have gone out of the railway station and come back again in order that we may sum up the number of times constituting frequency of visit. I think it is constituted sufficiently by a person moving about a public place and again and again attempting to commit a felony. Therefore upon that point also this order should be discharged. The convictions will be upheld, and the order *nisi* in each case discharged, with costs.

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Holroyd, J.*Orders discharged.*Solicitor for the informants: *Guinness*, Crown Solicitor.Solicitor for defendants: *A. E. Jones*.

R. H. C.

PRACTICE COURT.

O'DONNELL v. O'BRIEN.

Betting—"Place"—*Evidence*—*Movable box*—*Police Offences Act 1890 (No. 1126)*,
s. 49.

A movable chattel may constitute a "place" within the meaning of sec. 49 of the *Police Offences Act 1890*, by reason of the fact that it may temporarily appropriate a piece of ground for the purpose of betting, and whether there has or has not been such an appropriation is for the justices to determine.

Gleeson v. Adams (20 V.L.R. 229) applied.

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March 6.A'Beckett, J.

ORDER TO REVIEW.

On 28th October 1898 Thomas O'Brien was charged upon the information of David George O'Donnell, a police constable,
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at the Court of Petty Sessions, Caulfield, under sec. 49 of the *Police Offences Act* 1890, with, on 8th October 1890, had used a "place" for the purpose of betting with persons resorting thereto.

From the evidence of the informant it appeared that on 8th October 1898 the defendant, a bookmaker, was on the Caulfield racecourse during the afternoon. That he stood behind an iron box about two feet high and oval shaped—about 12 inches by 15 or 18 inches. He was wearing a betting bag on which was the name "Thomas O'Brien," and "Reg. V.R.C." He had a bundle of tickets, and was calling out the odds. The witness saw people handing him money and receiving tickets in return. After the races he saw persons coming to defendant and handing him money, and he saw them paying him. Defendant was doing this all the afternoon till five o'clock. The witness saw that the defendant sometimes got down from the box and moved about. The witness saw in cross-examination that he understood that the object of standing on a box was to prevent ticket snatching. This evidence was corroborated, and evidence of particular bets was also given, and of the receipt by the defendant of money for which he gave tickets. The justices fined the defendant with 3*l.* 3*s.* costs. An order to review this decision was obtained on the grounds that—(1) there was no evidence that the defendant used a place for the purpose of betting with persons resorting thereto; (2) the justices were wrong in holding that they had no discretion to determine whether the box upon which the defendant was standing was or was not a place. After the order *nisi* was granted the justices answered questions sent to them at the request of counsel. They informed the Court that they found as a matter of fact that the box on which defendant was standing was a "place" within the meaning of the Act. Whereupon the second ground was abandoned at the hearing of arguments upon the order *nisi*.

Coldham appeared for the defendant to move the order absolute.

Wasley appeared for the defendant to show cause—Until the decision in *Powell v. Kempton Park etc., Co.* (a), a defendant was liable to conviction under the Act, the box on which he stood being a “place” within the meaning of 16 and 17 Vict., c. 119, s. 3, the words of which are the same as in sec. 49 of the *Police Offences Act 1890*: *Bows v. Fenwick* (b); *Gallaway v. Maries* (c). In the latter case the facts were similar to the present case. *Powell v. Kempton Park, etc., Co.* is referred to in *Reg. v. Humphrey* (d), where the defendant was convicted after betting in an archway. *Gallaway v. Maries* is cited with approval in our Court: *Gleeson v. Adams* (e).

Coldham in reply—The word “place” must be construed as *ejusdem generis* with “house” or “room.” *Bows v. Fenwick* was only rightly decided if the umbrella was held to be in the nature of a tent. I rely upon *Powell v. Kempton Park, etc., Co.*

[A'BECKETT, J., referred to *Hawke v. Dunn* (f).]

That case is practically overruled by *Powell v. Kempton Park, etc., Co.* If the chattel is not physically capable of being a place within the meaning of the section no user will make it such a place. There is no evidence here to support the justices' decision.

A'BECKETT, J. The cases commented on in the recent decision relied upon by the defendant's counsel have gone a long way in their interpretation of sec. 49, and there are expressions in that decision which seem to show that some of the Judges think they have gone rather too far; but I must consider them as showing the condition of the law in England upon this subject. They recognize that a temporary appropriation of a piece of ground by a person betting may constitute “a place” within the meaning of sec. 49 of the *Police Offences Act 1890*. That which I think is necessary to an offence under the Act is that there should be an appropriation of the particular spot by something being done by the person

(a) [1898] 1 Q.B. 241.

(b) [1874] L.R. 9 C.P. 339.

(c) [1881] 8 Q.B.D. 275.

(d) [1898] 1 Q.B. 875.

(e) [1894] 20 V.L.R. 229.

(f) [1897] 1 Q.B. 579.

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affected, in order to subject him to the provisions of the Act. Take, for example, the case in which a man has a platform, which he takes to a racecourse and puts upon the ground. He can put it there and take it away again. Apparently the Judges who expressed opinions doubting whether the cases of *Gallaway v. Maries* (g) and *Bows v. Fenwick* (h) had not gone too far would, notwithstanding all which they have said in disapproval of these cases, be prepared to hold that such a platform would be a "place" within the meaning of the Act, and that if a person used a small movable structure as a place for betting, such a temporary structure would be, though movable, a place for betting within the meaning of the Act. I think it thus becomes a question for the justices whether the structure which they have to consider in the case before them comes within the principle of the Act. I do not think it could turn upon the size of the box. To say it is or is not so many inches high or wide does not affect the question. It must be in every case a question for the justices whether the structure or chattel upon which the prosecution depends is or is not such as to be fairly regarded as the appropriation of a piece of ground for the purpose of making bets. I find that this view of the Act has been adopted, though it is not necessary to his decision, by Madden, C.J., in our Court in *Gleeson v. Adams* (i). Hood, J., and I have taken the same view. I think it would be wrong, because an expression has been used in the English courts stating that certain English authorities had gone rather too far, to say that the law is that the appropriation of a piece of ground by a movable chattel may not constitute a "place" within the Act. Although the box this man stood on was very small, and although I could have understood the justices if they had decided that this chattel did not constitute a "place," I cannot say their present decision is wrong. This box was placed in a particular spot, left there, and the defendant returned to it from time to time, and it would be flying in the face of the law, as I gather it from the English decisions, and in the

(g) 8 Q.B.D. 275.

(h) L.R. 9 C.P. 339

(i) 20 V.L.R. 229.

face of the statement of the Judges in *Gleeson v. Adams*, to hold that there was no evidence on which they could decide that the box was a "place" in reference to the occasion and to the surrounding circumstances. I think that there was evidence to justify the conclusion at which the magistrates arrived. The order *nisi* will be discharged, with costs.

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Order discharged.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitors for defendant: *Gillott, Bates & Moir*.

R. H. C.

[IN CHAMBERS.]

BOSTOCK v. EDGAR AND OTHERS.

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March 7.
Hood, J.

Company—Mining company—Action by shareholder—Forfeiture of shares—Non-payment of call—Subsequent redemption—Companies Act 1890 (No. 1074), ss. 241, 247—"Rules of Supreme Court 1884"—Order XIX., r. 27—Order XXV., r. 4.

A shareholder in a mining company failed to pay his call within fourteen days of the date on which the same became due. Subsequently he redeemed the shares by payment of the call.

Held, that there was a gap between the forfeiture and the redemption during which he ceased to be a shareholder.

The omission of a material allegation in a statement of claim is not cured by an inference of the allegation from the heading of the writ.

In an action by a shareholder in a mining company, on behalf of himself and all other the shareholders of the company except the individual defendants, against these defendants and the company, claiming *inter alia* an account and payment of certain secret profits made by the defendants as promoters of the company, the fact that the plaintiff is a shareholder must be alleged in the statement of claim; it is not sufficient that the writ and statement of claim are headed as on behalf of himself and all others the shareholders except the individual defendants.

Semble, *per* HOOD, J. If a shareholder in a mining company institute an action as such and forfeit his shares by nonpayment of a call and again becomes a shareholder by redemption of the forfeited shares, the fact of forfeiture does not preclude him from succeeding in the action.

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SUMMONS in Chambers.

Henry Bostock, a miner, issued a writ on the 14th Feb 1899 against William Haslam Edgar, Frank Stuart, John son, and the Snowy Heights Gold Mining Company No Liability. The writ was headed—"Between Henry Bostock, on behalf of himself and all other the shareholders of the Snowy Heights Gold Mining Company No Liability except the individual defendants (naming them)," and claimed in the same that the individual defendants were "liable to pay to the company all profits and gains made by them out of or in consequence of the flotation of the company and for such other relief as the circumstances of the case may require." In his statement of claim the plaintiff claimed in the alternative 1250/1 damages in respect of the defendants' fraud in concealing from the other shareholders in the company the fact that they were vendors to the company of a certain lease and claim, and in selling the lease and claim at an enhanced price to the company. There was no allegation in the statement of claim that the plaintiff was himself a shareholder in the Snowy Heights, etc., Company. From an affidavit filed by Edgar, one of the defendants, it appeared that prior to the 8th of February 1899 Bostock was the proprietor of 100 shares in the company, and that on the 8th February a pro rata call made call on the capital of the company became due and payable. On 3rd March the defendants Edgar Stuart and Waterson obtained a summons seeking an order that the statement of claim be struck out on the ground that it did not disclose any cause of action, inasmuch as it was not truely alleged that the plaintiff was a shareholder in the defendant company. The summons also sought in the alternative an order that the action be stayed on the ground that the plaintiff was not a shareholder in the company. The plaintiff did not pay the call upon his shares in the company until after the issue of this summons was served upon his solicitors on 4th March 1899.

The summons now came on for hearing before Hood, J.

Irvine in support—The action fails if the plaintiff is not a shareholder. The statement of claim should set forth

material facts : Order XIX., r. 27. The shares were absolutely forfeited at the expiration of fourteen days from the date when the call became due and payable: *Companies Act* 1890 (No. 1074), sec. 241.

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O'Hara Wood to oppose—The plaintiff had the right to redeem the shares, and by redeeming them he continued to be a shareholder: *Companies Act* 1890, sec. 247. The redemption related back. The heading to the writ and statement of claim shows sufficiently the capacity in which the plaintiff is suing. A plaintiff is not bound to allege everything he must prove at the trial. The summons does not ask for an amendment. Order XIX., r. 27, does not apply here. The defendants are not embarrassed. There is no power to strike out the statement of claim in the present application: Order XXV., r. 4. The plaintiff was a shareholder at the time he instituted the action, and is now a shareholder.

There was no appearance for the defendant company.

Irvine in reply was not heard.

HOOD, J. Everything that could possibly be said in opposition to this summons has been urged by Mr. O'Hara Wood, but in my opinion he is wrong upon every point. The meaning he seeks to attach to the last words of sec. 247 of the *Companies Act* 1890 would be such as to render it impossible for these mining companies to carry on their business. If the last words—"He shall thereupon be entitled to the share as if the forfeiture had not been incurred"—mean that the moment a man redeemed his forfeited shares the redemption related back to the time when he held the shares, so that he would be a shareholder from the time of the forfeiture to the time of redemption, then it would be impossible for the company to carry on its business, because it would never know who were its shareholders. There is no power to compel a shareholder who has forfeited his shares to redeem them. The only means the company could employ in such a case would be to sell the shares, perhaps at an inconvenient time. In my opinion

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the section means that when such a person redeems and comes back into the company there is a gap or period from the time of forfeiture to that of redemption during which he ceases to be a shareholder.

It was then contended that, although it is not distinctly alleged in the statement of claim that the plaintiff is a shareholder, he is at liberty to fall back upon an inference implied from the heading of the writ. No doubt it can be inferred from the heading that the plaintiff is a shareholder, but that is not sufficient compliance with the rules of pleading. The heading is not part of the pleading, nor can the defendant plead to it, though he might take out a summons to compel the plaintiff to put it into proper form. I can think of no rule which entitles a party to supply an omission which is material in such a pleading. That being so, the defendant is entitled to have the material facts stated in the body of the statement of claim. This is a material fact: it is the very essence of the plaintiff's claim. The plaintiff cannot interfere unless he is a shareholder. He must allege the fact of his being a shareholder, and must prove that fact at the trial.

The allegation in the other portion of the summons was that at the time when the summons was taken out in the realisation of which I have given to sec. 247 of the *Companies Act* 1894. Since then the plaintiff has gone back into the position of a shareholder in the company. I am inclined to think that a man commences an action as a shareholder, and forfeits his shares for nonpayment of a call, and again becomes a shareholder by redemption of shares forfeited in the meantime, and if a shareholder at the time of trial, the fact of forfeiture does not prevent him from succeeding in his action, though such a question should not be finally decided on this application, as it can be raised at the trial. On that ground, therefore, the summons fails, although on the other it succeeds.

It has been urged that there is no power to strike out the statement of claim on the present application, and that an amendment is asked for by the applicant the summons. I think, however, that I have power to strike out the statement of claim. Clearly it is embarrassing, and in addition it discloses

no reasonable cause of action. I order the statement of claim to be struck out unless the plaintiff amend within four days.

Summons allowed.

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Solicitors for plaintiff: *Smart & Walker.*

Solicitors for defendants Edgar Stuart and Waterson: *S. B. Backhouse.*

R. H. C.

[IN CHAMBERS.]

GUYMER (ADMINISTRATRIX) v. SOUTH GERMAN REEF GOLD MINING COMPANY NO LIABILITY.

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March 7.
Hood, J.

Mines Act 1897 (No. 1514), s. 140—Procedure—Trial in Supreme Court—Injury—Accident in mine—Costs of application.

The onus of proof that an action for injury by reason of an accident in a mine should be tried in the Supreme Court is on the person applying, and it lies upon him to show that it is probable that difficult points of law will occur.

APPLICATION under sec. 140 of the *Mines Act 1897* for an order than an action be brought in the Supreme Court.

On 31st October 1898 Matilda Guymer, administratrix of the estate of William John Guymer, issued a writ out of the Supreme Court against the South German Reef Gold Mining Company No Liability, claiming damages by reason of the death of William John Guymer through the negligence of the company. To this writ the defendant company entered an appearance on the 7th November 1898. On 15th November the statement of claim was delivered. On the 30th November the defendant obtained a summons asking that the writ and statement of claim should be struck out, and on the 14th December A'Beckett, J., made an order allowing the summons on the ground that the writ had been issued out of the Supreme Court without the leave required by sec. 140 of the *Mines Act 1897*. Application was then made by the plaintiff *ex parte* to A'Beckett, J., for an order that an action for the same cause be brought in the Supreme Court. A'Beckett, J., held that notice should be given to the intended

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defendant of the application, and adjourned it for that purpose. The plaintiff accordingly gave the defendant notice, and now renewed the application.

Herbert Barrett for the applicant.

Counsel referred to secs. 129, 135 (2), 137, 140, 148, and 152 of the *Mines Act* 1897 (a); to *Hoddsman v. Maxwell* (b); *Cross v. Victorian Railways Commissioner* (c); and *Cowie v. Berry Consols, etc., Company*, No. 1 (d).

McCay for the defendant.

HOOD, J. This is an application under sec. 140 of the *Mines Act* 1897 for an order that the plaintiff be at liberty to bring an action in the Supreme Court instead of the County Court. That section provides—(His Honor read it and continued):—In passing that section the Legislature must be taken to have meant that *all actions* of every description brought under this Act for injuries received by a person when working in a mine were *prima facie* to be brought in the County Court. The Legislature must also be taken to have understood that questions of law arising out of the operation of the Act itself would necessarily occur in these actions. The clear intention is that the ordinary action for damages received by a miner in the course of his employment should be brought in the County Court. Then it is contemplated that there may occasionally be special cases in which difficult points are involved, and in

(a) *Mines Act* 1897 (No. 1514):—"Sec. 140. Every action to recover damages against any owner or employer in respect of any injury sustained by reason of an accident in a mine shall subject to the provisions of any law for the time being in force as to the venue of County Court actions be brought in any County Court whatever be the amount claimed and except as hereinafter mentioned such action shall not be brought in the Supreme Court. Provided always that if it appear to any Judge of the Supreme Court on application of either party that

such action ought more properly to be brought in the Supreme Court such Judge may order that such action be brought in the Supreme Court or if it be already commenced be transferred to the Supreme Court. Provided further that there shall be the same right of appeal from the County Court to the Supreme Court as in other cases of actions brought in the County Court."

(b) [1888] 14 V.L.R. 121.

(c) [1897] 3 A.L.R. 207.

(d) [1898] 24 V.L.R. 206.

these it may be more advisable to bring the actions in the Supreme Court in the first instance. I think the intention of the Act is to throw on the person applying before a Judge the burden of proving that the particular action is such a special case. It is not sufficient for him to show that it is an action under the *Mines Act*, and that possibly difficult points of law would therefore occur in it. The Legislature must be taken to have known that such points were always possible in such actions. In my opinion the applicant must in every case under this Act show that the probability is that difficult points would occur. All I have heard to-day could be urged in support of a similar application in every case under this Act, and so the section would be nugatory. Here the only suggestion is that, being under the *Mines Act*, the case should be brought in the Supreme Court, and if I were to grant this application it would be impossible to refuse any. I refuse the application, but without costs, as I doubt my power to give costs to the defendant.

Application refused.

Solicitor for plaintiff: *Marshall Lyle* (for *Robertson*, Ballarat).

Solicitors for defendant: *McCay & Thwaites*, Castlemaine.

R. H. C.

DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.

BELTON v. BELTON.

Divorce—Desertion—Petition—Cross petition—Dismissal—Fresh petition—Same ground—Marriage Act 1890 (No. 1166), s. 74.

In 1894 a husband filed a petition for dissolution of his marriage upon the ground of desertion. His wife filed a cross petition for dissolution on the ground of misconduct. Both petition and cross petition were dismissed. There was no resumption of marital relations, the wife resisting all attempts of the husband in that direction and concealing herself from him. In 1898 the husband filed a fresh petition for dissolution upon the ground of desertion.

Held, that no new desertion had occurred, the old offence continuing.

Held also, following *Fitzgerald v. Fitzgerald* (L.R. 1 P. & D. 694), that there could be no desertion which did not terminate an existing cohabitation.

PETITION by a husband for dissolution of marriage upon the ground of desertion.

The facts are set forth in the judgment.

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A'Beckett, J.*Hobday* for the petitioner.

No appearance for respondent.

Cur. adv. vult.

A'BECKETT, J. read the following judgment :—This is a petition by a husband for dissolution of marriage on the ground of his wife's desertion. In December 1894 I dismissed his petition and also a cross petition by his wife in which she sought a dissolution on the ground of his adultery and cruelty. In my judgment I said—"Where both parties have been to blame and neither establishes a clear case to relief under the Act, though both parties desire the marriage to be dissolved the court cannot dissolve it," and with reference to the husband's petition that, assuming the desertion to have been satisfactorily proved, the husband's conduct had been a contributing cause, which under sec. 74 of the Act prevented me from granting him relief. Since this dismissal of the husband's petition there has been no resumption of cohabitation, though I believe that the husband wished that there should be and took some steps to bring it about. His wife concealed herself from him and is now in England. She has been served with the petition, and does not defend. In these circumstances I should have been glad to dissolve the marriage if the Act permitted me to do so, but it does not. There has been no more than the continuance of the desertion which I have held to have taken place after such misconduct on the husband's part as to exclude him from relief on that reason of it. If I was right then I cannot rightly grant him relief now, and it has not been contended that I was then wrong. The wife has committed no new offence but has continued the old one. Apart from this difficulty there is that arising from the principle established in *Fitzgerald v. Fitzgerald* (a) that there can be no desertion which does not terminate an existing cohabitation. Taken together they are insuperable, and I must dismiss the petition.

Solicitor for petitioner : *Hobday*.

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(a) [1869] L.R. 1 P. & Div. 694.

MITCHELL v. SPONG.

Injunction—Interlocutory—Landlord and tenant—Recovery of possession—Petty sessions—Reserved decision.

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March 7.
Hood, J.

An injunction to restrain proceedings before justices in petty sessions for the recovery by a landlord of possession will not be granted where the hearing before the justices has been concluded but the decision has not been given.

MOTION for interim injunction.

Hugh Mitchell, the plaintiff, by an agreement dated 28th April 1897 with William Walker, became lessee on that date of certain stables at the Highland Chief Hotel, Franklin-street, Melbourne, for the term of four and a half years at a weekly rental of 10s., payable weekly. On the 1st April 1898 Walker assigned in writing all his interest in the agreement to the defendant, Emma Spong. Since the assignment Mitchell paid the rents to the defendant. On 9th January 1899 Mitchell owed three weeks' rent, and on that day defendant issued a warrant of distress for the amount of 30s. On the same day Mitchell paid the amount to Baldwin, the defendant's agent, and received from him a receipt, and he then also paid out the bailiff. On this day also Mitchell was served with a notice to quit the premises within seven days, signed by the defendant, and on the next day he was served with a "Notice of owner's intention to apply to justices to recover possession." On 24th February 1899 defendant applied at the Court of Petty Sessions, Melbourne, for a warrant of possession. The justices, being unable to come to any decision, adjourned the matter to 1st March 1899, on which date it was reheard, and evidence was given on behalf of both parties. Amongst other evidence it was proved by Mitchell that on the 16th January 1899 he tendered the defendant the sum of 10s. for rent and she refused to take it, and that on every subsequent Monday up to the hearing of the application to the justices, sufficient money to satisfy all rents due had been tendered the defendant and refused by her. It was also shown that at the time the distress warrant was issued there were more than sufficient goods and chattels of the plaintiff's on the premises to satisfy the distress.

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The justices, after hearing the application, adjourned to 11 on 8th March 1899 to consider their decision. On the March Mitchell obtained leave from A'Beckett, J., to serve a writ of summons in the action a notice of motion for an order to restrain the defendant from continuing her application to the justices to recover possession of the premises referred to in an agreement of 28th April 1897, made between William W and the plaintiff, and from enforcing any warrant for possession of the premises, which warrant the defendant may obtain on such application, and from commencing or continuing any action or proceedings for such purpose until the trial of the present action. This motion now came on for hearing before Hood, J.

T. Power to move—The plaintiff is entitled to equitable relief against forfeiture. Notice of intention to apply for such relief is good, even if made prior to the proceedings before the justices.

Counsel referred to *Heaphy v. Bingham (a)*.

A. E. Jones for the defendant.

HOOD, J. The plaintiff in this case has issued a writ claiming an injunction to restrain the defendant from continuing her application made to the justices to recover possession of the premises, and from enforcing any warrant for possession of such premises, and from commencing or continuing any action or proceedings for such purpose until the trial of the present action. In my opinion this motion should be refused without costs. I think the plaintiff has acted in this matter just at the wrong moment. If his application had been made to me while proceedings were in progress before the Court of Petty Sessions, I would probably have restrained the other party from further proceeding in the ejectment application, upon the ground that it was inequitable after tender of the rent then made that the tenant should be turned out. If, on the other hand, the plaintiff had waited till the members of the Court of Petty Sessions had given their decision against the tenant, I probably

(a) Holroyd J. [1899] February 28, unreported.

would have made an order restraining execution or the issue of a warrant upon the same ground—namely, that it was inequitable. But, unfortunately for the plaintiff, he has stepped in with his application just at the moment when there was nothing more for the complainant to do, and the justices have done everything but give their decision. So that in my opinion there is nothing to restrain. I have no power to issue an injunction against a decision which may or may not be given, or which may when given be in favour of the complainant with all sorts of conditions attached to it. I refuse this application, with costs.

Application refused.

Solicitor for plaintiff: *Hopkins.*

Solicitor for defendant: *A. E. Jones.*

R. H. C.

REGINA v. RADALYSKI AND OTHERS.

Criminal law—Felony—Accessory before the fact—Instigator—Probable consequence—Crimes Act 1890 (No. 1079), s. 303.

The prisoners—a man and a woman—desired to procure abortion upon the body of a pregnant woman by means of electricity and the injection of a certain fluid. While the woman was endeavouring to procure abortion by means of the injection the subject of the operation died. According to the medical evidence the cause of death was suffocation, and there was evidence from which the jury might infer that the suffocation arose from an attempt by the woman to stifle the patient's screams. Upon the trial of both prisoners for murder the jury convicted the man as well as the woman.

Held, that the attempt to stifle the screams was an ordinary consequence of the operation, and that the man was rightly convicted as an accessory before the fact.

CROWN CASE reserved by Madden, C.J.

“REGINA v. OLGA RADALYSKI, TRAVICE ALEXANDER TOD, AND
WILLIAM HENRY GAZE.

“SPECIAL CASE.

“The prisoners were tried before me at the February sittings of the Central Criminal Court on presentment for murder.

“The case made by the prosecution was that Radalyski, while attempting to procure the abortion of one Mabel Ambrose Discattia, caused her death, and that Tod and Gaze were

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accessories before the fact to her attempt to procure abortion, and were liable with her as for murder.

"There was evidence to go to the jury as against Radalyski that she attempted to procure the abortion, and that her actions in some way caused the almost instant death of Discattia.

"As against Tod the evidence (chiefly of his own confession) was that Radalyski and Discattia had informed him that Radalyski was using the shocks of a galvanic battery and injections of Condry's fluid into the vagina to procure Discattia's abortion; and there was evidence also that immediately before the 13th December 1898, the day of Discattia's death, Radalyski had told Tod she was going to inject Condry's fluid into the womb of Discattia, as she had been advised by a doctor. There was evidence that Tod was desiring and consenting to all these things being done to Discattia, who was pregnant by him.

"There was evidence that Radalyski, on 13th December 1898, was using active efforts (not expressly defined as against her) to procure the abortion of Discattia in a room in which they themselves were, and that she was using for that purpose an india-rubber syringe with a metal nozzle about 4 inches long and about $\frac{1}{4}$ of an inch thick, and that she was injecting Condry's fluid into the vagina or womb of Discattia by its means; that Discattia suddenly gave a loud scream, with a short interval between; that one was a muffled scream; and when a girl named Dubberke, an inmate of the house, came running into the room, alarmed by the scream, Discattia was stretching her body out on a bed on which she was lying, and then fell back quite unconscious and pronounced dead; at all events she never again showed any active signs of life, and actually died. It was thought by Dubberke that seeing the foregoing occurrence that she detected some signs of life in Discattia, because the eyes, which were staring, did not look so dead then as they did afterwards, and she procured some brandy to try and revive her, which brandy was administered to the extent of a couple of spoonfuls.

"The medical testimony, to summarize it, established that the proximate cause of death was suffocation, as manifested

the heart and respiratory organs; that there were no signs of violence, external or internal, in the way of bruise or traumatic injury to any organs; that all the organs of the body except the brain were quite healthy, and were normal in condition. The brain was too much affected by decomposition to be successfully examined. That the nozzle of the syringe might have been introduced into the mouth of the womb, closed though it was, without leaving any laceration or injury; that a fibrinous plug which naturally closes the mouth of the womb at conception and continues so till parturition had disappeared, and that this might have been occasioned by passing in the nozzle of the syringe or any other similar instrument, or might have disappeared by decomposition. The medical evidence could not assign any secondary cause of death which produced the phenomena of suffocation, but conveyed the opinion that a hand placed over the patient's mouth to stifle screams might have done it, and that no other cause suggested in cross-examination was as likely to have produced it.

"The evidence also affirmed that Condyl's fluid stains, but there were no stains on the syringe, or on the vagina of Discattia, or on the bedclothes.

"There was further evidence that injections of Condyl's fluid into the vagina were usually harmless, and that even if injected into the pregnant uterus it would rather stimulate than cause shock or suffocation.

"Mr. Cole, for the prisoner Tod, contended that while a principal offender attempting to procure abortion is liable for death caused in any way by any means used in such attempt, an accessory is responsible for death by ordinary consequences only of the means which he himself advised or counselled or was privy to. That Tod had been accessory to an attempt to procure abortion by the injection of Condyl's fluid only, and the evidence showed that that agent when injected did good rather than harm, and that if any other thing caused death he had not counselled or procured it. I refused to discharge Tod at the close of the Crown case.

"I told the jury that an accessory once proved to be such stood in precisely the same position as the principal offender so long as the latter did not substantially depart from the

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particular crime to which the other was accessory, and that in this case death was caused by any means used by her endeavouring to procure abortion Tod would be liable.

"I also told the jury that if Tod's responsibility was limited to the ordinary consequences of the method of attempting abortion which he counselled, there was evidence that what happened was the ordinary result. That in the injection, in fact, of the Condyl's fluid into the vagina of Discattia, or the unskilful efforts of Radalyski, or so, or her efforts to control the resistance or the cries or struggles of Discattia caused death the jury might regard or any of these things as being the ordinary result to be expected in the course of such attempts, or they might find that Discattia grew faint and cried out, and that an effort to stifle her cries had, in her fainting state, when she needed specially to recover the heart action, in fact suffocated her. A hand over her mouth then might kill her easily, though in her ordinary condition it would be different. If they thought this was the fair inference from the evidence they might draw it, and it, too, might, in my opinion, be regarded as an ordinary consequence of injecting, or attempting to inject, Condyl's fluid into the womb; and that if they were satisfied that the death was caused by any of these means they might convict Tod if they saw fit, whether it was the true legal proposition on which his guilt depended was not the question which I laid down or that for which his counsel contended.

"The jury convicted Radalyski and Tod and acquitted him. I consented to reserve in the case of Tod a special case for the opinion of the Full Court on the point so raised, and I have the honour to submit for the opinion of this honourable Court the questions whether I was right—

"(1.) In refusing to direct the jury to find Tod not guilty at the close of the case for the prosecution.

"(2.) In charging the jury as I did on the point now submitted.

"I have summarized the evidence bearing on the questions involved, but I have attached hereunder the evidence which is to be regarded as part of this case.

"JOHN MADDEN, C.J.

H. S. Cole for the prisoner Tod—The woman Discattia, according to the medical evidence, died of suffocation. This evidence is consistent with the view that she died by reason of something entirely distinct from the means used to procure abortion. There was no direct evidence of the act which caused death.

[WILLIAMS, J. You must prove that Tod was not responsible as an accessory before the fact to the act which caused death.]

Suffocation is not a probable consequence of the instigation by Tod : *Foster on Crown Law*, p. 369.

[WILLIAMS, J. The extension of the instances given is against you.

MADDEN, C.J. If, instead of trying to procure abortion, Radalsyki had taken up a stick to kill her or had tried to administer poison, then Tod would not have been responsible. If something were done to quieten the woman's cries, though not to kill, then he is liable.]

An accessory is only liable in the ordinary course of events : *R. v. Francis Fretwell* (b); *Hale's Pleas of the Crown*, p. 616, quoting *R. v. Saunders*.

[WILLIAMS, J. Tod may be held to have contemplated that a hand would be placed over the woman's mouth to ensure secrecy.]

This is an extrinsic act for which he cannot be held liable.

J. T. T. Smith for the Crown was not heard.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., WILLIAMS and A'BECKETT, JJ.] The Court entertains no doubt about the proper judgment to give in this case. The rule of law that is laid down by the authorities as to cases of this kind appears to us to be clear as to the principle that if a person while endeavouring to commit a felony by some means or other kills another person he is responsible for the murder. It is a principle of law that an accessory before the fact as such once established in

(b) [1862] 9 Cox. 152.

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that character stands in the same position as the principal offender. The difficulty which arises here is from the fact that some authorities are relied upon by counsel for the prisoner Tod to show that an accessory before the fact is only responsible for the ordinary consequences of the act which he advised. But an examination of these authorities shows that the words "ordinary and probable consequences" are used in them with regard to a felony in which both were engaged, but in order to emphasize the non-liability of an alleged accessory before the fact for the result of a felony which he did not instigate, although he may have advised the principal to commit some other felony. It is found that in all the cases the words "ordinary circumstances" were used merely for the purpose of showing that if an accessory requires A. to commit a particular felony, and A. instead of doing so, or taking steps to do so, turns aside and commits another felony which the accessory did not advise, then the accessory is not rendered responsible by reason of the new enterprise of the principal.

Now, in this case the evidence is clear that both Tod and Radalyski desired and intended to procure abortion on the body of Discattia by means of electricity and the injection of Condyl's fluid. The evidence is certainly strong from which the jury might conclude that on the 13th of December 1898 Radalyski was endeavouring to carry out that desire and intention when the death of the girl occurred. There was evidence also from which the jury might infer that among the means used to procure that abortion was the injection of Condyl's fluid into the body of the young woman, to which means, according to Tod's own confession, he was an accessory, and during the attempt by this means to procure abortion the woman died, according to the medical evidence of suffocation. If the matter rested there the evidence would, I think, be sufficient to convict both prisoners, because the jury might conclude that the death by suffocation resulted in some way from the means taken to procure abortion. There was, however, some evidence which would warrant the belief that the method by which suffocation was caused was by an attempt on the part of Radalyski to stifle the girl's screams, in the interest not only of herself but of the woman, by putting her hand over

the latter's mouth when she was disposed to faint, and at that moment this was a most dangerous thing to do, one which no skilled person would attempt, when the respiratory organs were in an embarrassed state from want of air and suspension of the heart action, and which probably deprived the girl of air to such an extent that she died, though in a less weakened state she would not have been so easily suffocated. There was evidence before the jury from which they might conclude that death arose in that way. If this was so, then, according to the principle of the authorities, the death was one of the ordinary results of the illegal operation. The persons attempting this felony must have known that the girl operated upon might shriek, and if she did so, and if they ventured to interfere with her body in its natural condition, and thereby caused her death in the attempt to procure abortion, both were responsible, the person attempting the operation and the person who instigated it. This is manifest justice as well as a principle of law to prevent lives being imperilled in this way. If it were not so it would be impossible to vindicate the law in respect of these matters. The death was caused by the means used, and both parties are responsible.

The direction to the jury is substantially right, and the jury's finding is warranted from evidence which could not be withdrawn from them. The conviction will be affirmed.

Conviction affirmed.

Solicitor for the Crown : *Guinness*, Crown Solicitor.

Solicitors for the prisoner Tod : *Cole & Morris*.

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HEALEY v. BANK OF NEW SOUTH WALES (No. 2).

Practice - Appeal—Single Judge—Question of fact—Rehearing by Full Court—Judicature Act 1883, 47 Vict. (No. 761).

Where a party appeals from a decision of a Judge sitting without a jury upon a question of fact as to which there was contradictory *vivd voce* evidence it is the duty of the appellant to satisfy the Court of Appeal that the decision of the Judge was wrong.

The effect of the passing of the *Judicature Act 1883* upon this principle discussed.

If the party applying for a new trial has had a reasonable opportunity to adduce certain evidence at the trial and has not done so, the Court will not grant a new trial on the ground of the discovery of fresh evidence.

The decision in *Ward v. Hearne* (10 V.L.R. (L.) 163) applied.

APPEAL from a judgment of Hodges, J., at the trial of this cause without a jury. At the trial there was a conflict of *vivd voce* evidence. Judgment was given by Hodges, J., in favour of the defendant bank. The cause of action and the facts of the case material to this report are sufficiently stated in the judgment.

Hanbury C. Geoghegan for the plaintiff appellant.

Isaac A. Isaacs (A.G.) and *Irvine* for the defendant.

WILLIAMS, J. This is an appeal from a judgment of Hodges, J. In the course of this appeal we have only heard Mr. Geoghegan, counsel for the appellant, and yet this is the sixth day of his address to the Court. We have not considered it necessary to call on counsel for the respondents, and we should have been content without observation to dismiss this appeal with costs were it not that we think we ought to express ourselves shortly as to the nature and character of this appeal. Substantially a week of public time has been occupied by counsel for the appellant in support of an appeal on a pure question of fact, as to which the evidence on the one side and the other was contradictory, in which the credibility of the principal and opposing witnesses was constantly in issue, and on which the learned primary Judge has found against the plaintiff. That issue of fact was whether

certain moneys in the defendant's bank were the moneys of the plaintiff or moneys representing the proceeds of thieving operations by the plaintiff on the Government Savings Bank of New South Wales. As I have said, the evidence on this question was absolutely contradictory, and if there was any preponderance of evidence, the evidence appears to me to preponderate in favour of the defendants and not in favour of the plaintiff.

By far the most material—in fact, I may say the vital—portions of the evidence were taken *vivâ voce* before the learned Judge, and he, having heard and seen the chief witnesses in the case, has decided against the plaintiff. I do not hesitate to say that as soon as I became seized of the nature and character of this appeal its success became hopeless, and in my opinion it is an appeal that should not have been brought. Before the coming into operation of the *Judicature Act* in this colony the rule laid down and observed by the Supreme Court in relation to appeals of this character was this, that when a party appealed from a decision of a Judge on a question of fact as to which there was contradictory *vivâ voce* evidence it was the duty of the appellant to satisfy the Court of Appeal that the decision of the Judge was wrong or clearly wrong, and that unless the Full Court was so satisfied the appeal would be dismissed: *In the Will of Wolff* (a).

Precisely the same rule was laid down and observed by the English courts of law before the passing of the *Judicature Act* in England: *Re The Alice* (b); *Gray v. Turnbull* (c); *Smith v. St. Lawrence Tow-Boat Company* (d); *Salvin v. North Brancepeth Coal Company* (e).

It may be gravely questioned whether the passing of the *Judicature Act* has made any difference whatever in the application of this principle. According to the very able judgment of Lord Esher, M.R., in *Colonial Securities Trust Company v. Massey* (f), this principle has not only remained unaffected, but is the principle which, since the passing of the

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(a) [1875] 1 V.L.R. I.P. & M. 21, at p. 28. (d) [1873] L.R. 5 P.C. 308, at p. 314.

(b) [1868] L.R. 2 P.C. 245, at p. 247. (e) [1874] L.R. 9 Ch. 705, at p. 714.

(c) [1870] L.R. 2 Sc. & D. App. 53. (f) [1896] 1 Q.B. 38.

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Judicature Act, Courts of Appeal should continue to apply appeals of this particular description: See p. 39 of the report of the case cited.

Since the passing of the *Judicature Act* in this colony the same principle has been applied: *Koebeke v. Middlemiss* (g); *Monk v. Woods* (h); *Sheppard v. Penglase* (i); and similar cases in England since the passing of the *Judicature Act* there: *v. The Quebec Warehouse Company* (k); *Exparte Firth* (l); *Colonial Securities Trust Company v. Massey* (m).

We are bound by the decisions of the Privy Council on this point, and on reference it will be found that the Judicial Committee of the Privy Council has observed this principle to its full extent, both before and since the passing of the *Judicature Act*: *Re The Alice* (n); *Allen v. The Quebec Warehouse Co.* (o). In the latter case their Lordships, referring to the rule that should guide them in dealing with appeals from a judgment on a question of fact, say:—"The Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is what conclusion they would have arrived at if the matter had for the first time come before them, but whether the conclusion has been established that the judgment of the Court below is clearly wrong."

In *Exparte Firth* (p) Jessell, M.R., at p. 426, says:—"The rule has been over and over again stated in many reported cases that the Court of Appeal requires a very strong case indeed to induce the Court of Appeal to interfere on a question of fact where there has been conflicting evidence before the tribunal which has seen the witnesses. Lord Esher, M.R., in the later case of *Colonial Securities Trust Co. v. Massey* reiterates the same rule, explains its origin and its continuity unaffected by the passing of the *Judicature Act*. We are quite conscious that in later cases the House of Lords has not apparently applied the same rule: *Rickman*

(g) [1885] 11 V.L.R. 472, at p. 483.

(h) [1886] 12 V.L.R. 90, at p. 92.

(i) [1892] 18 V.L.R. 180, at p. 186.

(k) [1886] L.R. 12 App. Cas. 101,
at p. 104.

(l) [1881] L.R. 19 Ch. D. 419,
426.

(m) [1896] 1 Q.B. 38.

(n) L.R. 2 P.C. 247.

(o) L.R. 12 App. Cas. 104.

(p) 19 Ch. D. 419.

Thiery (q), but while decisions of the House of Lords are justly entitled to our highest respect, they are not binding on us. Those of the Privy Council are. The principle laid down by our own Court in reference to this class of appeal follows and accords with the principle laid down and observed by the Privy Council. Circumstances alter cases, undoubtedly, and there may be circumstances under which the rule would either be inapplicable or apply with less weight; but to the present case, the appeal we are now considering, the rule applies to its fullest extent and with its greatest weight. It is a case in which the Court is asked to interfere on a question of fact as to which there has been conflicting evidence before the Judge who has heard and seen the witnesses whose credibility has been the subject of constant attack and comment before us during the course of this appeal. Had the oral evidence and the finding been opposed to the documentary evidence in the case a different principle might have applied. Had the evidence submitted to the primary Judge been all, or substantially all, or in principal part taken in writing—that is, on commission, the rule would have applied with much less weight. Under the circumstances of the present case the appeal is so hopeless as almost in my opinion to justify the epithet of “audacious.” The vital evidence was taken *viva voce* before the Judge; it was absolutely contradictory, and the preponderance of the evidence was against the plaintiff and in favour of the defendants. Other Judges might not have felt the same degree of difficulty in arriving at a conclusion against the plaintiff on the evidence as it appears before us, in the present case, as the learned primary Judge seems to have experienced. The appeal, so far as it relates to entering judgment for the plaintiff, will be dismissed, with costs.

In the alternative, the notice of appeal is framed so as to ask for a new trial, on various grounds—one of evidence being improperly received, and another of evidence being improperly rejected. These points were disposed of during the argument. The only point argued, apart from these grounds, is that a new trial should be granted on the ground of the discovery of fresh evidence. That fresh evidence is set forth in certain affidavits

(q) [1897] 14 R.P.C. 105.

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which have been placed before the Court—the affidavits of the plaintiff and of Ogle. Those affidavits are fresh evidence obviously to satisfy the condition laid down by this in *Ward v. Hearne* (r). The new matter of which fresh evidence is said to consist is this, that Ogle in 1893, when he was in the dock in Sydney, at Darlinghurst, made a statement to the Court, and that in the statement to the Court he said that Joyce had told him in the remand yard at Darlinghurst Gaol, before the trial came on, that there were two other men engaged in the Savings Bank in Sydney who were joined with him in the robbery from the Savings Bank in Sydney, and he went on to say that neither of those two men was the plaintiff. He then proceeds to state what Joyce did tell him in the remand yard at Darlinghurst Gaol in 1893, and he says that Joyce told him then that there were two other men employed in the Post-Office who were engaged with him in defrauding the Savings Bank of Sydney; that Joyce had defrauded it to the extent of 3500*l.*, and that Joyce and the two other men had shared that sum between them. He then went on to tell Ogle the names of the two men. Those names are mentioned in the papers before us. It would be altogether wrong to mention their names now. Therefore it appears that Healey, ever since 1893, when that statement was made in the dock, knew that Ogle could prove, supposing his statement to be true, that Joyce, who implicates Healey as being concerned in this robbery, told him, Ogle, that there were two other men engaged with him in the robbery, who were employed in the Post-Office, and that neither of them was the plaintiff, and that he told Ogle their names. Then Healey, years after, having served his time under sentence for that conspiracy, bringing an action against the Bank of New South Wales here for the money, and the trial proceeds and lasts some time, and on the last day but one of the trial Healey sees Ogle in the street, addresses Ogle and tells him he wants him to come and give evidence on his behalf—in other words, I presume, to prove his statement that Joyce made to him in Darlinghurst Gaol. He professes to give his address to him, and says he will go

(r) [1884] 10 V.L.R. (L.) 163.

give evidence. Healey, according to his affidavit, says he could not find him at the address he gave, and that a false address was given. The learned Judge, it appears, did not deliver judgment till four or five days afterwards. When Healey met Ogle on the 9th November the trial was not concluded, and the judgment was not delivered till five days afterwards. Now, under those circumstances, and admitting, as I feel we are bound to admit, that this evidence would be very material in support of Healey's case, and as against Joyce, who was the principal witness against him, we think it was the duty of the plaintiff or of his advisers to have brought this at the first possible opportunity before the learned Judge, to have acquainted him with the nature of the evidence, and to have informed him that the man had been met and seen in Melbourne, that his present address could not be found, and to have asked for a postponement in order to have a reasonable opportunity to find this man. That was not done; absolute silence was maintained, and the Judge was in absolute ignorance of the finding of this evidence. One would have thought that, with reasonable diligence, that would have been pointed out, and that brings this case within the first condition laid down in *Ward v. Hearne*. If the person who asks a new trial has had a reasonable opportunity to adduce the evidence at the trial, on the strength of which he seeks a new trial, the Court will not grant a new trial on the ground of the discovery of fresh evidence, and such steps could, we think, have been taken in this case. The plaintiff, however, did nothing. I fully concur with that part of the decision in *Ward v. Hearne*. We think this fatal to the granting of a new trial. We think this motion should be dismissed, with costs.

HOLROYD, J. I concur in the judgment delivered by my brother Williams. I have very little to add to it; but, with reference to the duty of an Appellate Court with respect to the decisions of the primary Judge upon questions of fact, I desire to point out this, that in my opinion the Appellate Court is not exonerated from acquainting itself with the facts, or at least with so much of the evidence as the appellant brings before

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them, in order to ascertain whether the Judge below is clearly wrong or not. But if they are satisfied that he is not clearly wrong, and that there is such a contradiction in the evidence that the Judge might reasonably come to the conclusion at which he did arrive, I do not think it is necessary to go further, and to say that they would have come to a similar decision on those facts if the matter had come for the first time before them. It is quite obvious that in cases where there is a conflict of evidence it is an advantage to have observed the demeanour of the witnesses. It may be a slight advantage only in some cases, but in others an enormous advantage. Sometimes a Judge on reading a case has to say—"I cannot determine this without having seen the witnesses give their evidence. I cannot come to a conclusion upon it."

It must be remembered in reference to the practice of this Court that it was in advance of the English practice in 1854. We had the rules made then, which were in force when I came out here, and the Equity Judge took down all the evidence himself, and had it afterwards read over to the witnesses. He was in fact his own examiner. The primary Judge was then in the best possible position—in quite as good, and I should think in a better position, than a jury—to determine what the truth was. I am very glad that the Privy Council, whose decisions we have to follow, have held that the rule laid down by my brother Williams is correct, as it commends itself to my own common-sense. Of course, if the Privy Council should alter its opinion, we should have to alter our practice in the same way, but until that happens we have to follow our own practice, and not to follow the opinion of the House of Lords.

I wish to add upon this point that, having carefully studied the evidence, I should myself, so far as reading the evidence enables me to give an opinion, have arrived at the same conclusion as my brother Hodges. Upon the other point that has been raised, I was one of the Judges who decided the case of *Ward v. Hearne*, in which the rule was laid down, and I have subsequently followed it in this Court. The two things decided there by the Court are said by the late Chief Justice in his judgment to be these:—"First, it must be shown clearly that

the new evidence was not in the possession of the party applying, and could not by proper diligence have been procured by him at the time of the first trial." That is the ground upon which this Court has decided on this appeal. "Secondly, it must appear that the newly discovered evidence is such as ought, if it had been brought forward at the first trial, to have led the jury to come to a different conclusion from that at which they have arrived." I have some doubt myself about the word "ought"—whether it should not be qualified, and some such words as "would possibly" be used instead. That that is no new idea of mine, formed on cursorily glancing at the report now, I may observe that I am reported to have put during the argument the following question:—"What is meant by 'evidence such as would reverse the verdict?'" Learned counsel replied—"Such evidence as would justify the Judge in giving a direction to the jury—such evidence, that is, as must lead to an opposite result to what has happened." To that I rejoined by this question: "Is not the Court to endeavour to form an opinion itself as to the probable, not the necessary, result of the new evidence?" And that is my own view with reference to that case still.

HOOD, J. I so thoroughly agree with what has been said that I have nothing to add.

Appeal dismissed. Motion for new trial dismissed.

Solicitors for plaintiff, appellant: *Geoghegan & Perry.*

Solicitors for defendant, respondent: *Malleson, England & Stewart.*

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[IN CHAMBERS.]

IN RE MARSHALL HALL'S COPYRIGHT.

*Copyright—Register—Rectification—“ Person aggrieved ”—Copyright Act 1890
(No. 1076), s. 51.*

The words “ person aggrieved ” in sec. 51 of the *Copyright Act 1890* may include the person who caused the entry to be made.

Ex parte Poulton and Son (53 L.J. Q.B. 320) followed.

APPLICATION on summons to expunge entry from registry book of copyrights.

On the 11th July 1898 G. W. L. Marshall-Hall became registered as the proprietor of a copyright in a book entitled “ Hymns Ancient and Modern.” Application was now made by him on summons for an order that this entry upon the registry book should be expunged. It was stated by the applicant in his affidavit that he was advised and believed that by obtaining the entry under the title “ Hymns Ancient and Modern ” he was infringing the copyright in that title of persons resident in England. He stated also that at the time the entry was made he was not aware of the existence of the copyright in other persons, and he had been informed subsequently that the persons mentioned had, on 17th November 1898, entered at Stationers’ Hall their copyright in that title. In the affidavit it was stated also that he was a person aggrieved by the entry in the Victorian register, and that he was desirous, in order to avoid disputes, of having the entry expunged.

Mackey for the applicant—The person who caused the entry to be made may be a “ person aggrieved ” within the meaning of sec. 57 of the *Copyright Act 1890* : *Ex parte Poulton & Son* (a).

No appearance to oppose.

HOLROYD, J. I shall make the order asked upon the authority of the case cited.

Summons allowed.

Solicitors for Marshall-Hall: *Bruce & Robinson.*

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(a) [1884] 53 L.J. Q.B. 320.

[PRACTICE COURT.]

IN RE THE COUNCIL OF THE SHIRE OF EAST LODDON, EX PARTE
CHEYNE.

1898
September 16, 23.
1899
March 6, 7, 14.

Hood, J.

*Mandamus—Shire council—Closed road—Discretion of Judge—Power to disobey—
Meeting of council—Ordinary business—Notice of meeting—"Owner"—Local
Government Act 1890 (No. 1112), ss. 9, 10, 175, 176, 178, 180, 428—Vermin
Destruction Act 1890 (No. 1153), ss. 58, 59—Procedure—Rule—Direction—
—Service—Council.*

The lessee of a sheep run obtained from a shire council at one of its ordinary meetings permission under the *Vermin Destruction Act 1890* to erect gates across certain roads adjoining his leasehold within the shire. The notice calling the meeting did not set forth that the business was to be brought before the council. All the councillors were present at the meeting. Upon a rule *nisi* for a *mandamus* to compel the opening of these roads by the shire council,

Held, that as the council might at any time lawfully grant the permission the irregularity, if any, in the method of calling the meeting did not justify the Court in making absolute the rule.

On the hearing of an application to make absolute a rule *nisi* for a *mandamus* of this kind both the landowner and lessee are entitled to be heard.

A rule *nisi* for a *mandamus* to compel the opening of an obstructed road was directed to a municipal council :

Held, that the rule was properly directed.

Service of such a rule upon the municipal clerk is sufficient.

RULE *nisi* for a *mandamus*.

On 4th May 1898 Hodges, J., granted a rule *nisi* calling upon the Municipal Council of the Shire of East Loddon, and directed to the council, to show cause why a writ of *mandamus* should not issue, directed to the said council, commanding it to forthwith open, and keep open for public use, and free from obstruction, in accordance with sec. 428 of the Act 54 Vict., No. 1112, certain roads within the shire.

The relator, Andrew Cheyne, a resident ratepayer and landowner in the shire of East Loddon, wrote on the 14th March 1898, through his solicitors, to the shire council, requesting the removal of fences and gates from certain roads. These fences and gates had been erected by John George Ross and Hugh M. Ross, the lessees from Robert Craig King and Hugh Hutchinson, trustees under the will of Robert Moffatt (deceased), the owners of the Serpentine estate. Hugh M. Ross was a councillor of the shire of East Loddon. At the ordinary meeting of the council on or about 16th October 1896 Hugh M.

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Ross was present, and asked permission to place wire along the fences around certain portions of the Serpentine estate, and to close certain roads with swing gates. In the discussion a motion to grant the request was passed. Ross did not vote upon the motion. The notice convening the meeting of the council did not specify that the motion would be discussed, and no notice of it was given to the councillors. Cheyne and other ratepayers alleged that the obstructions were a source of great inconvenience and danger to them and to other ratepayers of the shire by reason of their frequent use of the roads. The roads obstructed were roads bounding the Serpentine estate, and dividing it from the land of other persons. The relator was requested to attend for the purposes of cross-examination upon his affidavit, but the cross-examination did not proceed with, owing to his continued illness.

Further facts material to this report may be collected from the judgment.

The rule *nisi* was now argued before Hood, J.

Leon and *Quick* appeared for the relator to move the rule absolute.

Box appeared for the owners and lessees of the Serpentine estate—I claim the right to appear and show cause. If my property or rights are endangered, the persons who appear against me interested or are likely to be affected are entitled to be heard.

Counsel referred to *Shortt on Mandamus*, pp. 368, 369; *Middlesex Justices* (a); *Short & Mellor, Crown Office Practice*, p. 40; *Crown Office Rules* 1886, rr. 60, 61; *Queen v. Stawell Shire* (b).

Leon—The *Local Government Act* 1890, sec. 428, is the section dealing with this matter. Those persons only are entitled to appear to show cause who are directly concerned in the litigation. This question should be limited to the persons named in sec. 428. (Counsel referred to *In re Glenelg Shire* *ex parte Seeley* (c).) *Queen v. Stawell Shire* is distinguished.

(a) [1843] 2 Dowl. N.S. 719.

(c) [1885] 11 V.L.R. 64.

(b) [1897] 23 V.L.R. 94.

in that case the facts were in dispute; here there is very little dispute as to facts. The rule is only directed to the council, and the rule absolute may only be served upon the person to whom the writ would go.

HOOD, J. This point is covered by authority. In the case of *The Queen v. Stawell Shire* the person interested was not only allowed but was directed to appear. Here the owners and lessees are interested in supporting the shire council's action. In *Applying on Mandamus*, p. 302, it is laid down that a person who is interested is entitled to be heard. Under sec. 428 there is a duty upon the council to have the road opened and kept open. The adjoining owners, who have obtained permission to close these roads, are entitled to resist the attempt to open the roads, and are equally privileged to appear before the Court and oppose it. Therefore Mr. Box is, I think, entitled to appear.

Mitchell and Cussen for the shire council of East Loddon to show cause—There is a preliminary objection. The rule *nisi* is not properly directed. The *mandamus* should not go to the council but to the municipality. It should go to a corporation. There is nothing in the *Local Government Act* 1890 which purports in any way to create the council a corporation. The term "corporation" is a convenient one to apply to shire councils. It is like the term "firm," which before the *Judicature Act* was not recognized in courts of law. It has been held that the terms "council" and "councillors" are synonymous. Sec. 9 creates the inhabitants, etc., a corporation. "Council," under sec. 428, means the councillors for the time being. If a municipal council, purporting to act under sec. 428, do not close a road their act is deemed to be the act of the municipality. In *Queen v. Shire of Morwell* (d), it was decided that the rule *nisi* for a *mandamus* should be directed to the corporation. The council is a shifting body, and may resign at any time. Holroyd, J., followed that practice in *R. v. Stawell Shire*. *Queen v. Morwell Shire* is not reported on this point. By analogy it resembles a writ issued against a firm before the *Judicature Act*. In

(d) [1896] 21 V.L.R. 641.

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Gisborne v. Murphy (e) the word "council" was stated at p. 65 to mean "a quorum of its members."

Box—Misnomer vitiates the writ: *Tapping on Mandamus*, pp. 314, 316; *Shortt on Mandamus*, p. 375. The duty is one to be performed by the corporation.

Counsel referred to *R. v. Abingdon* (f).

Leon—The service is perfectly good. The applications that have been made to the Court have all been made to the shire council.

Counsel referred to *Glenelg Shire, ex parte Coxon* (g).

[*Cussen*—The point there was that there was a difference between the affidavits and the rule.]

The service is good, because, under sec. 141, it is the council which appoints the municipal clerk, and here a specific duty is imposed on the executive body to do a certain thing, inasmuch as the Legislature says that it would be impossible to impose a duty on the corporate body. The clerk is appointed to transact the ordinary business. The council cannot always be present. It is a body which performs executive duties under the *Local Government Act* 1890 and it possesses one officer only—namely, the municipal clerk. The councillors are not to be served individually.

(Counsel was not heard further on this point.)

Box in reply—There may be service on the members of the council. The council is not the municipality.

[*Leon* referred to sec. 188 of the *Local Government Act* 1890.]

HOOD, J. Objection is taken in this case that the rule nisi ought not to have been directed to the council, but to the corporation, and that service of the rule on the clerk is not sufficient, as the document is addressed to the council. These are objections which one would strive to get over if possible,

(e) [1881] 7 V.L.R. (L.) 63.

(f) 2 Salk. 699.

(g) *Argus*, 31st August 1893.

and I think I see my way to get over them. The case referred by Mr. Box shows that where a duty which is sought to be enforced by means of a writ of *mandamus* is one imposed on part of a corporation the rule *nisi* is properly directed to that part, and not to the whole. By sec. 9 of the *Local Government Act* 1890 the corporation of a shire consists of "the president, councillors and ratepayers." Then by sec. 10 it is provided that "every municipality subject to the provisions of this Act shall be governed by a council and all acts of the council shall be deemed to be acts of the municipality." Then sec. 11 prescribes the number of councillors that form the council. The council, I take it, is a short and convenient way of describing that portion of the corporation which is called the "councillors." Therefore, when sec. 428 imposes a duty upon the council to keep roads open, it is speaking of the "councillors" transacting public business. They are the council and a portion of the municipality, and that being so the order *nisi* is directed to that portion of the corporation on whom is imposed the duty of keeping the roads open. I think, therefore, that that is sufficient. I should have no difficulty either in holding that the order would have been sufficient if directed to the corporation—that is, to the president, councillors, and ratepayers. That disposes of that objection. As to the service I have considerable doubt, and I am not sure whether I am not erring in matters; but where a part of the corporation is sued, service on the corporation's officer in the usual form must be sufficient; it seems the only way that a part of the corporation can be served. Where the party sued is portion of the corporation, service on the individuals would be bad. You could not serve any corporation by serving the individuals composing it, and on the same principle you cannot serve part of the corporation by service on the individuals. I think therefore that service on the clerk is sufficient.

The merits of the application were then dealt with.

Mitchell and Cussen—This application is not *bond-fide*, and is actuated by ill feeling. If the Court concludes that the motive of the application is malicious it will not grant it: *Shortt on*

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Mandamus, p. 251. The Court must be satisfied as to the applicant's motives. *Owen v. Churchwardens of All Saints* (h). In the case before Williams, J., *In re Glenelg Shire, ex parte Sealey*, which left the matter undecided as to *bond fides* or not, he decided that the applicant had a personal interest to open the road. That was an application to open *one* road. Could Cheyne apply to have every road throughout the whole colony opened, and would the Court in its discretion grant a *mandamus*? *Reg. v. Liverpool, Manchester, and Sheffield Railway Company* (i); *Reg. v. Peterborough Corporation* (k). With regard to the bulk of these roads Cheyne has no interest in them whatever. His action is merely with the purpose of annoying the landowners. The lessees obtained the consent of the shire council, but because some notice was not given this proceeding is instituted. Secs. 175, 176, 178, and 180 of the *Local Government Act* are directory. Notice need not be given to the public, but merely to the councillors. All that the section requires is that the sanction must be obtained. The sanction may be withdrawn at any time. Cheyne must have a real interest, and the application must be *bond fide*: *Reg. v. Peterborough Corporation* (k). He must also show that he is the real applicant. That is not shown. He must be really interested in the closing of the road. If he has an available road he would not then have a grievance. With regard to the *Vermin Destruction Act* there are in this case one or two questions of fact. First, they say that the swing gates are not swing gates within the meaning of the Act. "Swing gate" is not defined. Sec. 58 uses the words "with sanction." Sec. 59 uses the words "with approval." The shire council may withdraw their sanction if occasion arises warranting it—*e.g.*, if a goldfield is discovered in the neighbourhood. *Mandamus* will not go to compel the council to do something which may be rectified at the next meeting. The *Local Government Act* 1890, sec. 175, refers to ordinary business; sec. 176 to extraordinary business. The business of dealing with closed

(h) [1876] 1 App. Cas. 611, at p. 620.

(k) [1875] 44 L.J. Q.B. 55, 85.

(i) [1852] 16 Jur. 949; 21 L.J. Q.B.

roads is not extraordinary. Notice is merely for the purpose of giving councillors some intimation of what is going on, in order that they will be at the meeting. The language of sec. 179 is difficult. Probably a rate is something which requires a special order. Notices are for the use of councillors themselves. All the members of council may be present as in this case, and yet, if sec. 179 is mandatory, because one of them has not had two days' notice fresh notices have to be sent. The section is directory unless a councillor himself complain of want of notice.

Box for the owners and lessees of the Serpentine estate was also heard.

Leon in reply—The extent of the relator's interest does not matter. He is allowed to settle in a part of the country where the council has charge of the roads, and if the roads are not opened and kept open he may ask the council to open them. Under sec. 428 of the *Local Government Act* the duty is imposed on the council. The *Vermin Destruction Act* 1890 must be construed strictly against the landowner and in favour of the ratepayer. The sanction here was not given to the "owner" of the land, but only to the lessees. With regard to the sanction, the council must show that it exercised its power properly, and that all the obstructions were placed there by reason of a legal permission. It does not do so. All that is said is that the lessees were given permission to erect wire netting. Under sec. 175 of the *Local Government Act* it was not competent for the council to deal with business other than ordinary business. It was an ordinary meeting, and no notice was given the councillors. Ordinary business does not include giving this sanction, which comes under the words "such extraordinary business." The council is charged with omitting to do its statutory duty.

[HOOD, J. Why should it not grant its sanction to-morrow? If it can do so, why should the *mandamus* go?]

There is no assurance that it will be done, and it is time to discuss it when it is done. There is no evidence of Cheyne's want of *bona fides*.

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[HOOD, J. I do not see why he should not be a member of the syndicate, but I think he ought to show who the members of the syndicate are. His grievance is very shadowy.]

Mitchell, by permission—The owners of the estate paid for the erection of the wire netting and gates. The sanction was obtained by the lessees as agent of the owners. As to the question of *bona fides*, see *Reg. v. Garland* (l).

Leon—That was a private right.

Curr. adv. vul.

HOOD, J., read the following judgment :—This is a rule calling upon the Municipal Council of the shire of East Loddon to show cause why a writ of *mandamus* should not issue commanding the said council to forthwith open and keep open for public use and free from obstruction certain roads in the shire.

The relator is Andrew Cheyne, a resident ratepayer, and the matter has been greatly delayed owing to his illness and consequent inability to undergo cross-examination. The foundation of the application is sec. 428 of the *Local Government Act* 1890, which imposes upon the council of the municipality the duty of keeping open the public roads, and as there are obstructions upon these roads *prima facie* the council ought to cause them to be removed. For the purposes of this case these obstructions have been divided into two classes—those that were erected under the *Vermin Destruction Act* 1890 and those that had existed previously. As to the latter, I disregard them, for they do not constitute the real subject matter of the relator's complaint. I draw this conclusion from the correspondence and from the evidence of Mahoney, who appears to be the ruling spirit in the matter, and from the slight interest which the relator directs has in most of these obstructions. Turning to the other class, they were erected by the lessees of the Serpentine estate, purporting to act under the *Vermin Destruction Act* 1890. sec. 58 of that Act the owner of land intersected by a

(l) [1870] L.R. 5 Q.B. 269, at p. 272.

may with the sanction of the shire council inclose any of these roads under certain specified conditions. This section limits the operation of sec. 428 of the *Local Government Act* and enables shire councils to allow roads to be closed with fences and gates in order to prevent the spread of vermin. The obstructions were erected with the permission of the council, but the contention is that this permission is invalid, not having been obtained in accordance with the requirements of the *Local Government Act*. The sanction was granted at an ordinary meeting of the council to the lessees of the land, and no notice had been given of the intention to transact this business at that meeting. The facts that the lessees and not the owners were the persons who obtained the sanction of the council, and that there had been no notice, constituted the only serious grounds of complaint, though some other objections were taken, which were disposed of during argument. The point as to want of notice is founded upon secs. 175, 176, 178, and 180 of the *Local Government Act*. It was urged that this business was extraordinary business within the latter part of sec. 176, and that as the notice therein required had not been given the proceedings are void. These sections are not easy to construe, and a reference to the original sections in the *Municipal Acts* of 1863 does not help to clear the matter. But I do not feel called upon to decide whether or not the obtaining of this sanction is ordinary business, or whether the sections are directory only, or if mandatory whether the sanction once given may not be good, because the order *nisi*, in my opinion, fails in any event. This Court is asked to compel the shire council to open and keep open certain roads. At present it may be assumed that these roads are irregularly obstructed, but still the council has the power at any time to grant a permission which would be a complete justification for obstructing the roads. So that the Court would, if it issued this *mandamus*, be directing the council to keep open roads which the Act of Parliament gives it power to close, and such a *mandamus* could be practically disregarded, as the fences and and gates might be removed one day and re-erected the next. It was said that I ought not to speculate about what might be done. But in exercising its discretion as to the issue of a

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mandamus the Court is entitled to look ahead and to consider the probable consequences of its act, and no *mandamus* shall ever issue where the result will be barren, or where the party commanded may disregard the command with impunity. I am certain in this case that if a *mandamus* issued the council would at once proceed to grant a proper sanction, and so do the object sought, and no court ought to make an order that can be openly resisted. Moreover, a *mandamus* is not, in my opinion, a proper method of assailing mere irregularities of procedure. The council has in effect only done what the law allows it to do. The errors, if any, are entirely technical, and I consider that this Court ought not to interfere in a summary way upon such grounds. If the applicant has suffered any injury he has other remedies, but he is not entitled to have these roads open if the council determines to have them closed.

I refuse the application for this reason, but in addition I am not satisfied as to the *bond fides* of the relator. At best I think that his complaint only relates to the fences erected under the *Vermin Act*, but even as to these I believe that the real trouble is not the obstruction to the roads, but the threat of a prosecution for leaving the gates open. If it had not been for this threat I consider that these proceedings would never have been taken, and the only satisfaction that the promoters of this *nisi* can get is to find that the threat is apparently futile. The rule *nisi* will be discharged, with costs to the council only.

Rule discharged.

Solicitors for the relator: *P. J. B. Rymer* (for *Quick, L. & Rymer*, Bendigo).

Solicitors for the East Loddon Shire Council: *Connell, Crocker & Paling* (for *Connelly, Tatchell & Dunlop*, Bendigo).

Solicitors for the owners and lessees of the *Serpentine estate*: *Whiting & Aitken*.

R. H. C.

THE LONDON BANK OF AUSTRALIA LIMITED *v.* MURRAY AND
OTHERS (No. 2).

Deed of settlement—Power of appointment—Interest of settlor in land—Charge on interest in lands, effect of.

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By a marriage settlement, E. W., who was entitled to a share as one of the next of kin in her father's estate, which consisted of real estate, settled all her interest in trustees, who had power to convert the real estate and to invest and hold the proceeds subject to certain trusts. E. W. was to have the income from such fund during her life, with the power of appointment by deed or otherwise. E. W. had executed a power of appointment in favour of her husband in 1887. In 1890 E. W. executed a deed, purporting to charge in favour of the London Bank all her interest in the lands and documents of title referred to in the deed. The bank brought an action to enforce such charge over E. W.'s interest in the lands.

Held, that as the lands had passed to the trustees under the deed of settlement on trust for sale and conversion and investment, and to hold the proceeds thereof subject to the trusts, that the power of appointment contained in such deed did not relate to the lands, but only to the proceeds of the sale of such lands, and E. W. had no title or interest in the lands which the bank could take in such action.

THIS was a summons taken out by the defendants Murray and Cramer in an action brought against them by the London Bank of Australia Limited to take the opinion of the Judge upon certain points or matters arising in the course of proceedings held before the Chief Clerk in pursuance of the directions given to him by Hodges, J., by the order on further consideration made in the action. The following were the points raised:—(1.) Whether the defendant E. M. Wyburn has any interest as one of the next of kin of W. F. S. Murray, the intestate in the pleadings mentioned, in the lands and proceeds referred to in the judgment herein dated 8th November 1897. (2.) Whether the defendant E. M. Wyburn has any interest conferred upon her by the will of her deceased sister, E. M. Murray, and if so what estate or interest is so conferred upon her? (3.) Whether the defendant A. S. Masterton has any interest as one of the next of kin of W. F. S. Murray in the lands and proceeds referred to in the said judgment. (4.) Whether the defendant A. S. Masterton has any interest conferred upon her by the will of her deceased sister, E. M. Murray, and if so what estate or interest is so conferred, having regard to the fact that the said A. S. Masterton became insolvent on the 7th September 1892 and is still an uncertificated insolvent.

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The applicants also claimed that upon the result of the whole proceedings before the Chief Clerk the Chief Clerk should certify that neither the defendant E. M. Wyburn nor the defendant A. S. Masterton has any interest in the lands and proceeds mentioned in the judgment, and they seek the opinion of the Judge on such points accordingly.

The statement of claim in the action stated *inter alia* that W. F. S. Murray died in 1873 intestate, leaving five children, including the defendants E. M. Wyburn and A. S. Masterton. Administration of the estate was granted to the defendant John Murray in 1886. Part of the estate consisted of certain lands, which were specified. The defendant John Murray being indebted to the plaintiff on his own account, the defendants E. M. Wyburn and A. S. Masterton gave the plaintiff a guarantee on behalf of John Murray. By a deed dated 2nd October 1890 the defendants John Murray, E. M. Wyburn, and A. S. Masterton granted and assigned to the plaintiff all the lands and documents of title before referred to in the statement of claim for all the estate and interest of the said defendants, and covenanted to execute such further assurances or securities over the premises as the plaintiff might acquire. Certain of the lands were sold, with the consent of the plaintiff, and the plaintiff claimed a declaration that it is entitled to a charge or mortgage over the interests of the defendants J. Murray, E. M. Wyburn, and A. S. Masterton in the lands, and to have the said interests ascertained.

Judgment was given, no appearance having been entered by the defendants mentioned, referring it to the Chief Clerk to ascertain the respective interest of the defendants J. Murray, E. M. Wyburn, and A. S. Masterton in the lands mentioned or in the proceeds thereof. The certificate of the Chief Clerk was given on the 30th May 1898, and on the order for further consideration the Chief Clerk opened and reviewed his certificate, and gave the following certificate:—(1.) The interest of the defendant E. M. Wyburn in the said lands and proceeds consists of—(a) such interest as is conferred on her by the settlement dated 8th June 1885, made between F. H. Wyburn on the first part, E. M. Wyburn on the second part, and the defendants W. G.

Cramer and John Murray on the third part, and by virtue of an appointment thereunto executed by the said E. M. Wyburn on 22nd October 1887, and also (b) of such interest as is conferred on her by the will of her deceased sister, E. M. Murray, dated 9th April 1883. (c). The said settlement comprises one undivided fifth share in all the real and personal property left by W. F. S. Murray, intestate, to which the said E. M. Wyburn was at the date of the settlement entitled as one of the five children and next of kin. (The certificate then recited the effect of the deed of settlement, which is set out hereafter.)

The certificate then dealt with the interest of the defendant A. S. Masterton.

The defendant W. G. Cramer was sued as trustee of the deed of settlement referred to in the certificate. By this settlement, which was made in anticipation of marriage between E. M. Murray and F. H. Wyburn, it was agreed that the share and interest of E. M. Murray in the real and personal estate of W. F. S. Murray should be granted and assigned in manner appearing in the deed, and subject to the trusts and powers therein contained, and this also referred to all after-acquired property. All the share of the said E. M. Murray, either originally, by survivorship, or otherwise in the real and personal estate of W. F. S. Murray, and all the estate, right, and interest of E. M. Murray, were granted to and assigned to W. G. Cramer and John Murray to hold the same upon the trusts mentioned; the lands were to be sold and the proceeds invested, and the income from such proceeds so invested was to be paid to E. M. Murray for her separate use, she not to have the power to dispose or deprive herself of the benefit thereof by anticipation, and after the death of E. M. Murray the said proceeds were to be held "upon trust for such person or persons and to such uses as the said E. M. Murray shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment appoint and in default of such appointment and so far as no such appointment shall extend in trust for all the children or any child of the said intended marriage who being sons or a son shall attain the age of 21 years or being daughters or a

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daughter shall attain that age or marry. . . .” It was further agreed that if the said E. M. Murray should become entitled to any real or personal estate the same was to be conveyed to the trustees subject to the same trusts. The defendant E. M. Wyburn became entitled to certain property under the will of her sister in 1886. In 1887 E. M. Wyburn, purporting to act under the power contained in the settlement, appointed unto her husband, F. H. Wyburn, all the real and personal estate of and to which she might be entitled at the date of her death. The appointment provided and declared that that exercise of the power of appointment was and should be revocable by the said E. M. Wyburn by any deed.

Hayes in support of the summons—The Chief Clerk was wrong in certifying that Mrs. Wyburn had any interest in the lands. By the marriage settlement the lands passed to the trustees, who had power to convert and to invest and hold the proceeds subject to certain trusts. Mrs. Wyburn therefore had no interest left in the lands which she could charge. She was entitled to the income during life of her share out of the proceeds of the sale of the lands, and she had a power of appointment over her share of the proceeds; but she retained no power of appointment over the lands: *Blake v. Blake* (a); *Gale v. Gale* (b). The statement of claim specifically prays for the enforcement of the plaintiff's charge over Mrs. Wyburn's interest in the lands, and she has no interest. The deed conveys nothing to the bank as against the trustees. The plaintiff insists that she should execute her power of appointment in its favour; the deed constituting the charge gives no such right. “Property” and “power” are different things: *Farwell on Powers* (2nd ed.), p. 179. The same argument applies to the interest under the sister's will. Then, as regards the finding as to Mrs. Masterton, we have a right to point out to the Court that the certificate is wrong as to that, although it does affect the interest of a party who does not appear. The whole certificate is before the Court, and can be dealt with.

(a) [1880] 15 Ch. D. 481.

(b) [1856] 21 Beav. 349.

Higgins for the plaintiff to oppose—It is admitted that the plaintiff cannot touch the life interest of Mrs. Wyburn, but she has a power of appointment which the plaintiff insists upon being exercised in its favour. Although there is already an appointment in favour of the husband, Mrs. Wyburn can revoke that and can make an appointment in favour of the plaintiff. Equity will always enforce a remedy in aid of a purchaser or mortgagee as against a mere volunteer. It will not aid in favour of general creditors: *Farwell on Powers* (2nd ed.), pp. 327, 336, 338. The plaintiff has a claim against all the estate and interest of Mrs. Wyburn. There is no evidence of any other interest except this, and it was undoubtedly intended to cover whatever interest Mrs. Wyburn had in these lands or in the proceeds of the sale of such lands. The Court has jurisdiction to assist the carrying out of the contract: *Ex parte Gilchrist (c)*; *Steal v. Nelson (d)*. The Chief Clerk has followed the reference contained in the judgment, and the certificate is correct. With regard to the findings as to Mrs. Masterton's interest my friend cannot be heard at all; he does not represent her, and she has not delivered any defence.

HODGES, J. This matter comes before me on summons to express an opinion as to the correctness of the findings or determination of the Chief Clerk with regard to the interest of Elizabeth Wyburn and A. S. Masterton. The Chief Clerk has set out what he regards as the title or interest of those persons in both the real property and the proceeds of the real property referred to in a certain settlement. What I think it is the duty of the Court to do is not only to look at the judgment but to look at the pleadings and documents in evidence, to ascertain whether these persons have any interest which the bank can get hold of; if they have no interest which the bank can get hold of, then I think the certificate should state so, although that may not be following the exact words of the reference.

With regard to Elizabeth Wyburn's title the marriage settlement may be taken as the starting point. By the

(c) [1886] 17 Q.B.D., p. 532.

(d) [1839] 2 Beav. 245.

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marriage settlement all these lands passed to the trustee thereunder, the trustees having power to convert and the afterwards to hold the moneys in trust to be applied in certain way. Looking at the deeds to see what there was conveyed to the plaintiff, we find the effect thereof set out in paragraph 8 of the claim. (His Honor read the paragraph.) It charges all the estate of these individuals, among others, in the lands and documents of title thereafter referred to. Now if Elizabeth Wyburn had retained the power to appoint with regard to the lands I should have been inclined to hold that she had an interest in the land which the bank might have secured by these proceedings. But she has no power to appoint with regard to the lands, but only with regard to certain funds, and it seems to me that so far as this deed is concerned, as set out in the pleadings, there is nothing conveyed to the bank, neither any title to these lands nor any interest in these lands, and as the deed does not refer to it, any interest in the proceeds, and consequently, as I view the facts, the bank has really acquired no title whatever to these lands and no title whatever to the proceeds thereof. Although if the form of the judgment literally followed there may have been certain of the proceeds which Elizabeth Wyburn is in some way interested in which could properly have been referred to in the certificate, still, nothing will come to the plaintiff, the certificate would be useless for that purpose to the plaintiff, and would only be embarrassing and would serve to mislead rather than to guide. It would suggest that those were the interests which the bank was acquiring under this judgment, and for that reason I think the Chief Clerk in his investigation of these documents should have said that there was no interest in these properties which passed to the bank under the deed referred to in the eighth paragraph of the claim. I feel some difficulty as to what I ought to do about the certificate so far as it relates to A. Masterton. I think it would be disadvantageous to allow it to stand, and I think it should not be allowed to stand; it would certainly be misleading. Although the parties before me may have no right to deal with that matter, yet as it is before the Court I should deal with it, as it is a reference from Chambers

the Court. (His Honor then dealt with the costs, and, under the circumstances of the case, ordered that each party should abide its own costs.)

Solicitors for plaintiff: *Attenborough, Nunn & Smith.*

Solicitor for defendant: *Wyburn.*

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[IN CHAMBERS.]

BELTON v. BELTON, EX PARTE BELTON (No. 2).

Practice—Appeal—Application for leave to appeal in formâ pauperis.

Application for leave to appeal in *formâ pauperis* by a party in divorce proceedings who has not sued or defended in *formâ pauperis* in the Court below must be made to the Full Court.

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Hood, J.

THIS was an application by the petitioner in a divorce suit for leave to appeal in *formâ pauperis* to the Full Court from a decision of A'Beckett, J., dismissing the petition.

The application was made *ex parte*.

Hobday in support of the application—The same rule applies to the right to appeal in *formâ pauperis* as applies to the institution of an action or suit.

HOOD, J. According to the note in the *Annual Practice* 1899, under Order XVI., r. 31, you may have the right to appeal in this form; but the application must be made to the Full Court, and not to me. I have looked at the cases cited in that note, and I find that in *Ex parte Goldberg* (a) it is laid down that an application for leave to appeal in *formâ pauperis* by a party who has not sued or defended in *formâ pauperis* in the Court below must be made *ex parte* to the Court of Appeal. That case followed the decision in *In re Roberts, Kiff v. Roberts* (b).

Application refused.

Proctor for applicant: *Hobday.*

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(a) [1893] 1 Q.B. 417.

(b) [1886] 33 Ch. D. 265.

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[IN CHAMBERS.]

HALL v. NORTH QUEENSLAND INSURANCE SOCIETY

Practice—"Rules of the Supreme Court 1884"—Order XVI., r. 1—*Interrogatories*—*Leave to deliver further interrogatories*—*Form of application*.

Semble, an application for leave to deliver further interrogatories made *ex parte*.

THIS was an application for leave to administer further interrogatories. The first set of interrogatories had been administered and answer had been made in the usual way but it having become necessary to obtain further information by way of interrogatories application was now made *ex parte* for leave to deliver a further set.

Mitchell in support of the application.

[HOOD, J. Should not this application be made on notice to the other side ?]

There is no authority which decides that it must be on notice and if leave to deliver the first set of interrogatories can be granted *ex parte* there is nothing in the rules which would show that a second application must be made on notice. The English practice is different to ours.

[HOOD, J. I think I should grant the order upon the application thus made. It is possible that the objection may be afterwards raised.]

Solicitors for plaintiff: *Braham & Pirani*.

Solicitors for defendant: *Moule, Hamilton & Kiddle*.

W. H.

[IN CHAMBERS.]

IN RE THE GLENMONA GOLD MINING COMPANY NO LIABILITY.

The Mines Act 1897 (No. 1514), s. 168, sub-ss. 2, 4—Priority of miners' wages—Distribution of assets of no-liability company—Cessation of work of no-liability company—Wages first charge on property of company.

By sec. 168, sub-sec. (2) of Act No. 1514 it is provided—"In the distribution of the assets of any mining company under Part I. of the *Companies Act 1890* or company under Part II. of the said Act which is being wound up or in the distribution of assets on the cessation of work of a no-liability company registered under Part II. of the said Act there shall be paid in priority to all other debts of whatsoever kind secured or unsecured all wages not exceeding £50 of any workman who either before or after the commencement of this Act has entered into any contract in respect of services rendered to the company during two months before the commencement of the winding up or the cessation of work. . . ."

Held, that "the distribution of assets on the cessation of work" applies only to a distribution of the assets by the company on the cessation of work, and did not apply to the case of the sale of the machinery of the company by the sheriff at the instance of an execution creditor, and the workmen were not entitled to claim the proceeds of the sale as against the execution creditor.

By sec. 169, sub-sec. 4, the wages of workmen are to be a first charge upon all the property of the company.

Semble, that the purchaser of the machinery of the company at the sheriff's sale buys subject to the prior charge of the workmen over such machinery in respect of their wages.

SHERIFF'S INTERPLEADER.

This was an interpleader summons taken out by the sheriff. Reid Brothers and Russell had obtained a judgment against the Glenmona Gold Mining Company No Liability on the 4th January 1899, and a *fi. fa.* was issued on the 5th January. The sheriff seized and sold the machinery of the company on the 15th and 28th January. Claims were thereupon sent in by various miners who had rendered services to the company in respect of their wages. The sheriff then took out this summons. Affidavits were filed in which it was stated by the workmen that the company ceased to carry on work on the 10th December 1898. It was alleged by another deponent that work ceased on the 14th January 1899.

Cussen for the sheriff.

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Vasey for the execution creditor—Sub-sec. 2 of sec. 1 of Act No. 1514 does not apply to this case. That sub-section provides for two cases: first where there is a distribution of assets in a winding up, and secondly where there is “a distribution of assets on the cessation of work of a no-liability company.” These claims do not come under the first part because there is no winding up, and they are not included in the second part because this is not a distribution of assets by the company which is the state of things contemplated by the Act. The distribution of assets by a no-liability company often takes place when by reason of the company being in debt it cannot be wound up voluntarily and the shareholders do not desire to go to the expense of a compulsory winding up. It cannot refer to a chance distribution that may take place.

Counsel was stopped by the Court.

O'Hara Wood for Smith, one of the claimants—The object of the Legislature was to secure for the workmen priority of payment over other creditors; if the assets are allowed to be seized and paid away to a judgment creditor then the object of the Act will be defeated. This realization of the purpose and this handing over of the proceeds is undoubtedly a distribution of the assets. It may be that under sub-sec. 4 the workmen still have a charge over the machinery in the hands of the purchaser, and that he has bought subject to the first mortgage, a statutory one, of the workmen.

Macfarlan for the other claimants.

HODGES, J. In this case the sheriff has seized the property of a no-liability mining company, and has sold the same. The proceeds of the sale are claimed under sec. 1 of Act No. 1514 by a number of *employés* of the company to whom wages are due. The question is, which of the two parties is entitled, the judgment creditor or the *employés* of the company. The difficulty is created by the language of sub-sec. 2 of sec. 168. (His Honor read the sub-section.) The distribution of the assets of a mining company which is being wound up

clear and intelligible meaning; but then follow the words "or in the distribution of assets on the cessation of work of a no-liability company," and it is the interpretation of that clause which gives rise to the difficulty. It is said that this company has ceased work, that this seizure and sale by the sheriff is a distribution of assets, and that consequently the *employees* are entitled to be paid in priority to the judgment creditor. In my opinion the words "cessation of work" and "the distribution of assets" in that clause must be interpreted with reference to their immediate surroundings. I am not called upon to say what might be the meaning of the phrases in the abstract, but merely what they mean in that clause in the position in which they stand. In the first portion of the subsection there is reference to the distribution of assets of a company which is being wound up; that is, as I have said, clear enough. The company is being wound up, and everyone understands what a distribution of assets means under those circumstances. Then comes the clause under question, and I think in construing those words in that position the distribution of assets secondly mentioned must have a somewhat similar meaning to the words "distribution of assets" first mentioned—that is, in a winding up—and the distribution of assets referred to is something equivalent to a winding up. Just as in a winding up there is a cessation of work, and so in the distribution of assets secondly mentioned there is a cessation of work; so that it is intended to apply to a no-liability company which, probably being in debt, cannot be voluntarily wound up, and yet it is desirous of coming to an end without the expense of a compulsory winding up, and it stops work and proceeds to distribute its assets. There is a similar cessation of work in the case of sequestration, and there is a distribution of assets similar also to the case of sequestration. I think that that is what is meant, and consequently the clause does not apply to the case where a company is not distributing its assets, and the company has not, so to speak, ceased its work, but there is merely a compulsory stopping of the work by reason of the proceedings taken by the sheriff or his officers. I think that is borne out by the language

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used in sub-sec. 3. I think, too, that that must be the true interpretation, because no provision is made as to the person who is to determine when the work has ceased or as to the person who is to distribute the assets. It cannot mean that anyone can step in and say that the company has ceased work. I think it means the distribution of assets by the company on the cessation of work. I had some doubt whether the provision of sub-sec. 4 did not prevent giving that interpretation to sub-sec. 2, but I think the argument given in argument is right—that the wages are to be a charge upon the property in spite of the sale. It appears that may make that which the purchaser has bought of very small value. If under sub-sec. 4 these persons have a charge on the property, then the sheriff under his execution by virtue of *fi. fa.* has not sold the interests of these persons, and perhaps their interests are left untouched. What the sheriff sells is not that which the debtor is legally and equitably entitled to. If the debtor was not legally or equitably entitled, then probably the sheriff has not sold the interests of these persons. The claims of the several *employés* will be allowed. (His Honor has dealt with the costs.)

Solicitors for sheriff: *Gillott, Bates & Moir.*

Solicitors for execution creditor: *J. A. Willmoth & Son.*

Solicitors for claimant Smith: *Smart & Walker.*

Solicitor for the other claimants: *Larkin.*

W. H.

[PRACTICE COURT.]

SAINSBURY v. ALLSOPP.

1899
March 9, 15.Hood, J.

Licensing Act 1890 (No. 1111), s. 182—Selling liquor without a license—Evidence, admissibility of—Written statement of witness—Evidence of prior convictions—Order nisi to review.

A witness signed a written statement of the evidence he was prepared to give in a prosecution; when called, he gave evidence altogether inconsistent with such statement, and was treated as a hostile witness. The written statement was produced, and the witness admitted he had signed it, and said that it was true. The written statement was put in evidence.

Held, that the admission by the witness that the statement was true amounted to a repetition of the contents of the statement, and that it was for the magistrates to say which version they believed.

A defendant was charged under sec. 182 of the *Licensing Act 1890* with a first offence under that Act. After the close of the case for the defendant the bench announced that the charge was proved, and the informant then proceeded to give evidence of other convictions under sec. 182. Objection was taken to the admission of such evidence, but it was admitted. Upon an order *nisi* to review the conviction upon the ground of evidence being improperly admitted, the magistrate filed an affidavit stating that although the evidence was at first admitted, he subsequently announced that he would reject such evidence, and that he punished the defendant as for a first offence only.

Held, that the magistrate was justified in such course, and that the evidence must be taken to have been rejected from the consideration of the case.

ORDER *nisi* to review.

THIS was an order *nisi* to review the decision of the Court of Petty Sessions at Rutherglen. The informant, the licensing inspector for the district, proceeded against the defendant under sec. 182 of the *Licensing Act 1890* for having unlawfully sold liquor without a license. The evidence is sufficiently stated in the judgment of the Court. The defendant was convicted and fined 50*l.*, and the liquor on the premises was forfeited. The defendant obtained an order *nisi* to review the decision on two grounds — first, that such conviction was against evidence; second, that evidence was wrongfully admitted at the hearing. During the hearing, when one of the witnesses called for the prosecution was giving evidence he gave a version as to the sale of the liquor inconsistent with a written statement previously given and signed by him. The statement was produced, and he was asked if he had signed it, and he admitted that he had done so, and then upon being asked whether such statement was true

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he said "Yes." The statement was then put in evidence. That statement was in the following words:—"I am a miner, residing at the Great Northern. I remember Christmas Eve, Saturday, 24th December 1898. I met Mr. Little at my tent. He asked me to get a bottle of beer at Mrs. Allsopp's. He gave me half-a-crown. I went and got a bottle of beer, which I purchased from Mrs. Allsopp. I gave her the half-crown; I retained 1s. 6d. change. I brought it over to my tent and gave it to Little. There were two or three strangers in the house, but were only talking at the time I was there. The bottle of beer produced I got from Mrs. Allsopp and handed to Mr. Little, which I paid 1s. for Little for.—ALBERT GILL."

The magistrate filed an affidavit which, so far as material to the point of the improper reception of evidence, is set out in the judgment.

Lewers to show cause—The written statement was produced, and the witness who signed it said that such statement was true, and that amounted to a repetition of the facts contained in it; then when the witness proceeded to give another version of the transaction it became a question for the Court to decide which version was true. Then the point as to the evidence of prior convictions which might perhaps be objected to fails because the magistrate has sent in an affidavit in which he states that he disregarded such evidence. The magistrate was entitled to do this.

Counsel referred to *The Queen v. Fowler (a)*.

F. Gavan Duffy to move the order absolute—The written statement might be used to test the credibility of the witness, but it cannot be put in evidence as evidence against the defendant.

[HOOD, J. But the answer given by the witness that the statement is true amounts practically to a repetition by him in the witness-box of all the facts narrated in such statement.]

It was not used in that way at the hearing, and the accuracy of the facts therein contained was not tested. You cannot put

(a) [1894] 64 L.J. M.C. 9.

in a document, then get it explained, and then take part of the explanation and use that as evidence. The evidence as to prior convictions was clearly inadmissible; the defendant was charged as a first offender. The magistrate was manifestly influenced by such evidence, because he inflicted the highest possible penalty. Then the statement relied upon refers to a transaction on the 24th December 1898, while the information charges the defendant with an offence committed on the 25th December 1898.

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HOOD, J. As to the last point there is no difficulty. The witnesses were all speaking of the one transaction; one witness says that the transaction occurred on the 25th December, while Gill says it took place on the 24th December. It is for the magistrate to say which date they will accept. As to the other points I will reserve my decision.

Cur. adv. vult.

HOOD, J. The defendant was fined in the court of petty sessions in the sum of 50*l.* for selling a bottle of beer contrary to the provisions of sec. 182 of the *Licensing Act* 1890, with the further penalty of forfeiture of liquor found in her possession. An order to review that conviction was obtained on two grounds—first, that such conviction was against evidence; second, that evidence was wrongly admitted at the hearing. Dealing with the first ground the evidence for the prosecution was that a man named Albert Gill was employed to trap the defendant; he was given half-a-crown and sent to the defendant's house in order to buy a bottle of beer and bring it back with him to the person who sent him, who was named Little. Little swore that he gave Gill half-a-crown, saw him go away, saw the defendant give a bottle to Gill; that he did not watch Gill come straight back, but lost sight of him; that Gill did come back with a bottle, which he handed to him, and which was the bottle produced in Court. That bottle contained beer. Gill was called to prove the sale, and he at once swore that he did not buy the beer from the defendant, but that what he did get was two bottles of dandelion beer

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according to one and dandelion ale according to another affidavit. The inspector who was prosecuting then requested that he be allowed to treat the witness as hostile, and was permitted to do so. Taking the answering affidavit with the affidavit in support of the order *nisi*, what took place was this:—Hood stated that he got dandelion ale, he was then asked if he had made a true statement to a constable; then the written statement signed was produced, and Gill was asked if he made it and he said he did; he was then asked if that statement was true, and he said "Yes." (His Honor read the statement.) Hood was then asked how he could reconcile the two statements, and he proceeded to give an ingenious but a false explanation, viz., that in the written statement he was speaking of dandelion beer, and he said that that is false, because his verbal evidence shows that he bought two bottles of dandelion beer; his written statement is that he bought a bottle of beer, and in addition that he brought the bottle to Little—that is, that he gave the bottle which he bought to Little. His verbal evidence is that he did not do anything of the sort, but gave to Little a bottle of beer of his own. The magistrates acted on this evidence, and thus given, and rightly so. If the witness had sworn that his previous written statement was false it might be different. But the witness gave two versions, both on oath, because he swore that his written statement was true, and I take that to be a repetition of the facts contained therein, and it was for the justices to say which version they believed, and I should have had no hesitation in coming to the same conclusion as they arrived at, that Gill did buy a bottle of beer. That disposes of the first ground.

The second ground covers two points. One was an objection as to what took place between the constable and Gill in regard to the "statement." I am not at all clear that it was admissible, but it was totally irrelevant and harmless. Gill had already given the evidence in cross-examination as a hostile witness, and had said how he gave the statement, and the corroboration by the constable was therefore not material. The other objection was more serious. After the close of the evidence the court announced that the offence had been proved, and

informant then stated that he proposed to prove two prior convictions. Objection was raised, but the evidence was given. The objection was based upon the ground that under the *Licensing Act* severer punishment is meted out for a second offence than for a first. The defendant's counsel contended that this evidence ought not to be given, inasmuch as the defendant was charged as for a first offence. I think a great deal might be said in support of the admission of the evidence, not as proving a second offence, but in aggravation of punishment as in the Criminal Court. But assuming that it is inadmissible, and assuming that it can be reviewed, the evidence having been given after conviction, still the magistrate's affidavit disposes of the objection altogether. He states that he did admit the evidence at first, but that afterwards he announced that he would reject the evidence and treat the defendant as a first offender. It has been over and over again decided that if in the course of a trial evidence is improperly admitted, the Judge may direct the jury not to consider that evidence, and the same rule should apply here; and the magistrate, according to his statement, did reject that evidence. It was urged, in order to show that the evidence had affected his mind, that he inflicted the highest possible penalty; but I am not to assume that there were not many things which might properly influence his mind, such as the offence being rife in the district. The circumstances did not call for leniency, for if the offence was duly proved, then the witnesses for the defence must have committed perjury. All the objections fail, and the order will be discharged, with costs.

Order nisi discharged.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitors for defendant: *Gavan Duffy, King & Ahearn*,
Wangaratta.

W. H. M.

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December 13.
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February 3.
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[PRACTICE COURT.]

IN RE CATHERINE SMITH.

*Probate practice—Regulæ Generales, 23rd June 1873—Probate—Rule X
Executor's accounts—Attachment for non-filing of accounts—Costs.*

An executrix had neglected to file the fifteen-months account required by the rules. A beneficiary under the will wrote to her solicitors requiring the account to be filed. The request not being complied with, the beneficiary's solicitors prepared materials necessary for the obtaining of an order *nisi* for attachment, and incurred costs therein. Subsequently the accounts were filed, but the executrix refused to pay the costs of the beneficiary. An order *nisi* was then obtained calling upon the executrix to show cause why she should not be attached for contempt of court in not having filed the accounts within the time prescribed.

Held, that the executrix was in contempt for not having filed the accounts, and that the Court had jurisdiction to enforce the payment by the executrix of the expenses incurred by the beneficiary in procuring the filing of such accounts.

ORDER *nisi* calling upon the executrix of a will to show cause why she should not be attached for contempt of Court in not having filed accounts within fifteen months of the grant of probate. The facts are fully set out in the judgment.

Pigott to show cause.

Kilpatrick to move the rule absolute.

Cur. adv. vult.

A'BECKETT, J. This is an application nominally for the attachment of an executrix for contempt of court in not having filed her fifteen-months account in proper time, but really for enforcement of a demand for 3*l.* 3*s.* costs by the solicitors of the applicant. It is to be regretted that so costly and oppressive a process should have been resorted to for such a purpose, and I should have been glad to have felt myself at liberty to refuse the application, leaving the parties to bear their own costs.

I feel, however, that where an executrix fails to perform her duty in this respect, and fails after due notice to pay the costs incurred by others in securing its performance, I cannot but absolve her from liability because I think that more consideration might have been shown her and that the parties pre-

for payment were less forbearing than they might have been. Probate of the will of the testator was granted to the executrix in March 1891. The estate was valued at 525*l*. She swore the usual affidavit, undertaking that she would make out, sign, and deposit in the Master's office within fifteen months an account of her administration. She did not do so, and in March 1893 a letter was sent from the Master's office requiring her to file it. She took no notice of this letter. On the 29th August 1898 Abbott & Beckett, acting on behalf of a beneficiary, asked her solicitors, Haden-Smith & Fitchett, to get the account filed. No answer was sent, and in September the request was repeated, with a threat of attachment if it should not be complied with. An explanation was given that the accounts were being prepared, and information was also afterwards afforded as to the result of the accounts, but the accounts themselves were not filed on the 21st October, when Abbott & Beckett wrote to say that they would at once prepare the necessary materials for an attachment for contempt. On the 24th of October Smith & Fitchett wrote informing Abbott & Beckett that the accounts had been filed. Abbott & Beckett answered on the same day—"In view of the fact that affidavits in support of the application for attachment had been prepared and sworn before your interview this morning, and considering the trouble and expense your client has occasioned, we think she should pay the costs, which we are willing to fix at 3*l*. 3*s*. If we do not receive this sum before eleven on Wednesday, we shall instruct counsel to apply for the order *nisi* on Thursday." Smith & Fitchett wrote, on the next day, saying that they expected to see their client in a day or two, and that they would then show her this letter. Then Abbott & Beckett write, refusing to give time, and stating that if they did not receive a cheque for 3*l*. 3*s*. by the day named they would prepare and deliver brief to move for the order *nisi* on Thursday next. A letter of expostulation was sent in answer and replied to by a letter of justification and consent to hold over the motion for another week. Another week passed, nothing was paid, and then the 3*l*. 3*s*. dispute was advanced another stage by an application to Madden, C.J., for an order *nisi* to commit for contempt, and to order

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costs to be paid. The Chief Justice appears to have shared views as to the undesirable character of the proceedings specially directed that if the executrix paid 3*l.* 3*s.* costs in up to the application, and 4*l.* 4*s.* costs of the application order *nisi* should not issue. The executrix was informed of this, but did not pay, and so the matter was advanced a stage by motion to make the order absolute, which I have now to deal with. The argument has been solely as to costs, and accounts eventually filed are accepted as sufficient, and to show a balance due to, not by, the executrix. In dealing with the matter I have to bear in mind that it has arisen from omission of the executrix to do that which the law required and which she had undertaken to do. Further, the order was required to perform it by a person entitled to the information which it afforded, and that some slight error was occasioned to this person in obtaining it, for the 3*l.* 3*s.* does not appear to be an excessive amount. It is also difficult to suggest any mode by which the executrix could have been compelled to pay the expenses she has occasioned other than that which has been adopted. I am satisfied that the Court has jurisdiction to enforce payment of expenses so occasioned, and it is merely the trivial amount in demand, and the seemingly needless haste in enforcing it, which have disinclined me to give costs to the applicant. The executrix had two chances of escaping, on comparatively easy terms, but both were declined. I cannot refuse to enforce her liability because I think that a little more time for consideration might have made these proceedings unnecessary, but I may temper the severity of the order sought against her. I do so by adopting the amounts fixed by the Chief Justice as the measure of her liability up to the motion to make the order absolute. I do not forget that these amounts were fixed conditionally on her paying them without delay, and I do not consider the amounts so fixed in any way binding on me. If the executrix elects to have the costs taxed which are represented by these amounts she can have them taxed, and as I could in my discretion refuse costs altogether, I am not exceeding my powers in ordering this payment in lieu of payment of taxed costs.

I order that the rule be made absolute as to the costs of and subsequent to the motion to move the rule absolute, which I direct to be taxed and paid by the respondent. I also order that, unless the respondent within one week elect to have an order made against her for payment of the taxed costs antecedent to such motion, she do also pay to the applicant within one month the sum of 7*l.* 7*s.*, for the costs of and incidental to this application up to moving the order absolute. I reserve liberty to either party to apply.

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A'Beckett, J

Solicitors for executrix : *Haden-Smith & Fitchett.*

Solicitors for applicant : *Abbott & Beckett.*

W. H. M.

[IN CHAMBERS.]

HEALEY v. THE BANK OF NEW SOUTH WALES (No. 3).

Practice—Appeal to Privy Council—Security for costs—Supreme Court Act 1890 (No. 1142), s. 231.

1899
March 15.
—
Hood, J.

By sec. 231 of Act No. 1142 in an application for leave to appeal to the Privy Council the Court shall "require that the person appealing from such decision shall give such sufficient security as aforesaid for payment of all costs previously incurred and to be incurred by reason of such appeal."

Held, following *Speight v. Syme* (21 V.L.R. 530) and the former practice of the Court, that the "costs" referred to are the costs of the appeal to the Privy Council, and not the costs of the trial previously incurred.

But *quære*, per HOOD, J., whether such decision and such former practice are not in contravention of the terms of sec. 231.

THIS was an application for leave to appeal to the Privy Council. The plaintiff appellant brought an action to recover a large sum of money from the Bank of New South Wales. The action was tried before Hodges, J., without a jury, and the trial lasted for six days, judgment being given for the defendant, with costs. From this decision the plaintiff appealed to the Full Court, and after several days' argument on behalf of the appellant, the appeal was dismissed (a). The plaintiff now applied for leave to appeal to the Privy Council under sec. 231 of the *Supreme Court Act 1890*.

(a) See *ante*, p. 694.

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Geoghegan for the plaintiff in support.

Irvine for the defendant—The words in sec. 23 *Supreme Court Act* 1890 “all costs previously incurred all the costs of the action. In *Speight v. Syme* (b) A’Beckett decided the other way. There are no costs “previously incurred in the appeal except those of the trial. The appeal really does not commence until leave is given. It can be contended that these words refer to an affidavit made upon application. This contention is met by the fact that there is no appeal until this application is granted.

Geoghegan in reply— There could have been other costs of an application to stay proceedings upon the judgment of the Full Court—though technically the appeal might not exist. The defendant should not have security in a judgment to an operative judgment.

Cur. adv. vult.

R. I.

HOOD, J. This was an application for leave to appeal to the Privy Council under the provisions of sec. 231 of the *Supreme Court Act* 1890. Mr. Irvine for the respondent raised the objection that the words at the end of that section relating to security for costs, necessitated the appellant giving security not only for the costs of the appeal but also for the costs of the trial. (His Honor read the section.) I am very much impressed by that argument, and if the matter were before me for the first time I should be inclined to yield to it. However, I have made a search in the office of the Prothonotary, and I find that the practice is the other way. There is also the express decision of A’Beckett, J., against such a contention. Under the circumstances I think I ought to follow the practice and the decision, and let the respondent appeal to the Full Court. I thought worth while so to do. I will grant the order, looking at previous cases and the orders made therein I

(b) [1895] 21 V.L.R. 530.

should in this case increase the amount of security to be given. I find the amount usually fixed is between 300*l.* and 500*l.* To my own knowledge a number of these cases were simple cases. This case took six days at the trial, and if the comparatively simple cases require the security of from 300*l.* to 500*l.*, I think I should direct that in this case the security should be fixed at 700*l.* The increase of security does not represent past costs, and I have followed the former practice.

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v.
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OF
NEW SOUTH
WALES
(No. 3).

Hood, J.

Solicitors for appellant: *Geoghegan & Perry.*

Solicitors for respondent: *Malleson, England & Stewart.*

W. H. M.

CAYRON AND OTHERS v. RUSSELL AND OTHERS (No 2).

Practice—Procedure—Leave to appeal to Privy Council—Order in Council, 9th June 1860—"Person or persons"—"Value"—"Amount"—Mining property—Security for costs—Form of conditional order.

1899

February 21,
March 2.

Holroyd, J.

Two applications are necessary for leave to appeal to the Privy Council under the Order in Council of 9th June 1860. On the initial application the party seeking the order has first of all to satisfy the Court that the judgment sought to be appealed involved either directly or indirectly any claim or demand respecting property of the value of 500*l.* The Court, when so satisfied, grants a conditional order declaring the amount and value of the security to be entered into by the appellant for the prosecution of the appeal and the payment of costs, and directing whether the judgment appealed from be carried into execution or be suspended pending the appeal. If the applicant comply with this order within three months a subsequent application is necessary for a final order that the terms have been complied with and the appeal allowed to be made.

The words "person or persons" in the Order in Council include both appellant and respondent where the judgment appealed is not entirely in favour of one party.

MOTION under Order in Council of 9th June 1860 for leave to appeal to Her Majesty in her Privy Council from a judgment of the Full Court pronounced in the suit on 8th February 1899.

Higgins for the plaintiffs to move.

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Topp for defendants (except Burk, Evans, Lachar, Gerschel) to oppose.

Irvine for Julia Gerschel took no part in the argument.

Cur. adv. v.

HOLROYD, J. In this case I have felt more difficulty anticipated, and have thought it right to reconsider the Order in Council under which the present application for leave to appeal is made. It will be recollected that in *J. v. Colclough* (a) the Court then sitting for the hearing of equity appeals pointed out the distinction between appeals under secs. 33 and 34 of the Act 15 Vict. (No. 10) embodied in the *Supreme Court Act* 1890, and under this Order in Council. Barry, J., said:—"There are two distinct modes of appeal to the Privy Council, one under the *Supreme Court Act* 15 Vict. (No. 10), secs. 33 and 34; the other under the Order in Council of 9th June 1860, made under the 7 & 8 Vict. It seems there has been a mingling of the two forms of procedure. Under the *Supreme Court Act* the matter in appeal must be of the value of 1000*l.*; the right to apply must be exercised within thirty days; the appeal can be granted from a decision by which the merits of the case may be concluded, and on complying with certain definite terms for security for costs and for performing such conditions as may be directed by the order of the Court or a Judge. If the appeal be not entered into within three months, the benefit of the order giving leave to appeal is waived; if not complied with in effect discharges itself without motion or other application as in cases at common law of leave to amend the *nisi* record or a pleading adjudged bad on demurrer, or postponement of a trial on payment of costs within a fixed time, if the condition be not complied with the order lapses *ipso facto*. Under the Order in Council the procedure is different; there the application for leave to appeal must be within fourteen days; the value is

(a) [1874] 5 A.J.R. 131.

at 500*l.* The Court may give similar directions as to enforcing the judgment decree order or sentence in the meantime, on proper security being given; and in all cases security must also be given not exceeding the value of 500*l.* for the prosecution of the appeal and payment of all such costs as may be awarded, &c.; and if such last-mentioned security be entered into within three months, *then and not otherwise* the said Court shall allow the appeal. So that two orders are required: the first on the application for leave to appeal, which is a conditional order; the second when the security shall have been perfected, which is an order absolute." The decision in that case is binding upon me, and assuming that under the Order in Council two applications are required, I have to consider what is to be decided in the first instance and what in the second, and then to determine those matters. Now the procedure under what were secs. 33 and 34 of 15 Vict., No. 10, is tolerably plain. The language of the sections is quite clear, but I think the reverse is the case with this Order in Council. It is exceedingly difficult to interpret, and I am not quite sure that in the interpretation I am about to put upon it I am following the very terms of the decision given by the Court in *Johnson v. Colclough*. I think that my brother Hood when at the bar described, during argument in *Johnson v. Williams (b)*, what the procedure ought to be. He said—"The procedure under the Order in Council is that a person desirous of appealing must ask the Court to state the terms on which he may appeal. Then if he comply with them within three months he may come back to the Court and ask for leave to appeal. Nothing is complete until the final order of the Court at the end of the three months. Until that order it is only a conditional leave to appeal." Now with some slight alteration I think that is a correct statement. It appears to me that the first order should be, so far as regards the terms on which the appeal may be allowed, merely declaratory, and a subsequent application must be made for an order asking the Court to find that these terms have been complied with and that the appeal is allowed. "Allowed" is an unhappy word, because it has a technical meaning, but of course

(b) [1887] 13 V.L.R. 252, at p. 254.

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Holroyd, J.

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(No. 2).

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it must be understood to mean "allowed to be made." be observed that in speaking of the security which is given the order uses two forms of expression. The Court to direct whether the judgment appealed from is to be into execution or the execution thereof suspended pending appeal, and in case the Court directs the judgment, carried into execution "the person or persons in whose the same shall be given shall before the execution thereof into good and sufficient security to be approved by the said for the due performance of such judgment or order as Her Majesty her heirs and successors shall think fit to make there That is upon the judgment appealed from. That leave for the Court to say what shall be considered good sufficient security, and what the amount of such security shall be. The Court has been in the habit of leaving the Prothonotary to determine as to the sufficiency of security and its amount. When, however, the order specifies security to be given by the party appellant, it says that security shall be "in a bond or mortgage or person of cognisance not exceeding the value of 500*l.* sterling for prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty her heirs and successors by the Judicial Committee of the Privy Council to the parties respondent." In that case an option is plainly given to the nature of the security. The word "value" is used "not exceeding the value of 500*l.*" "Not exceeding" is that the Court has in the first instance to determine the thing. It must at once determine at least the amount of security, and in order to give any meaning to the word "value" it must subsequently determine whether the security given is worth that amount.

Formerly it was the practice to fix the amount of security. Subsequently, in a few cases, that sum has been diminished. I think it will be my duty first to say what shall be the amount of the security. The Court will afterwards have to say whether the terms of the order have been complied with by security having been found for that amount and being of that value. It is obvious that a bond or person

recognizance, whatever the actual sum named, might not be worth anything. In the case of *Kettle v. The Queen* (c) it was decided that it had to be found as a matter of fact by the Court before any appeal would be allowed at all, even conditionally—that the judgment appealed from involved either directly or indirectly a claim demand or question respecting property or a civil right amounting to or of the value of five hundred pounds sterling. That is preliminary to any application of this kind being entertained, and that is the first point which I have had to investigate.

In his affidavit Pierre Henry, one of the plaintiffs, has sworn that the judgment in this suit was given “for and in respect of a matter at issue between the parties above the value of 500*l.*,” and that it “involves directly and indirectly a claim demand and question to and respecting property far exceeding 500*l.* in value and also a civil right amounting to or of the value of 500*l.* sterling and upwards.” But so far as the value of the property is concerned—that is to say, the amount—I should attach very little importance to his opinion, because, like many other persons engaged in this litigation, he has been merely guessing. He complies with what the Privy Council requires in terms, but as a matter of fact he can know very little of the matter. On the other hand, some parties in the case have made what appears to be an extravagant estimate of this mine, while others declare that it is worth nothing at all. The peculiar circumstance is this—those persons now approving the mine are those who have disparaged it, and those who seek to show that it is not worth 500*l.* are those who formed an extravagant estimate, and are still prepared to sacrifice their money to keep it. Now, I find as a fact—it is partly a question of fact and partly one of law—that the judgment appealed from does involve directly or indirectly a question respecting property of the value of 500*l.* and upwards. It is excessively difficult to come to any conclusion as to the value under any circumstances. It cannot be contended that no appeal should be allowed in cases relating to mining property because it is impossible to say with certainty what the value of the mine may be. But here I have some

(c) [1866] 3 W.W. & A'B. (Eq.) 141.

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indication of its value. In the first place there is a suit pending in which an offer has been made and part of the plaintiff the mine will be worth more than because the money already deposited is sufficient to pay. On the other hand the defendants in the suit are willing to take the risk of involving themselves in continued litigation and also in the continued expense of maintaining the mine for the ultimate object of obtaining a better price than they can get by the contract into which Cayron entered with the L Company. For that reason this application for leave to set aside is well founded.

The next thing is to declare what should be the value of the security to be entered into for the prosecution of the appeal and the payment of costs. I fix that value at 450*l*. I think the expenses of the appeal are likely to be heavy from what I know of the time the hearing occupied both in the Court of Appeal and in the Court below. I think it is for the appellant to prove when they come before the Court the value of the time that a security, whether by a mortgage bond or personal recognizance in the amount of 450*l*., and of that *value*, has been entered into. I use the word "value" here as distinct from "amount." The security must be sufficient to realize the amount, and they must prove as much to the Court on their second application.

The next thing is to direct whether the judgment appealed from shall be carried into execution pending appeal or not. The judgment upholds that of Madden, C.J. The judgment of Madden, C.J., directs that the defendants—speaking generally, as there is some question as to whether the defendants was properly before the Court or not—shall have the costs of the action, but that the plaintiff shall have the costs of the issues upon which he succeeded. Both parties appear to agree that the result of the set-off of costs is due to the plaintiff. This led me to doubt for some time whether it would not be the wisest course to suspend the execution of the judgment pending the appeal. That, however, seemed to me harsh, and I therefore

better to allow the judgment to be carried into execution on the parties entering into the security which the Order in Council mentions, which will have to be approved by the Prothonotary for the Court. I have drawn up roughly the form of order which should be made:—

“Upon motion made the day of 1899 by counsel on behalf of plaintiffs for leave to appeal to Her Majesty in her Privy Council from the judgment of the Full Court pronounced herein on the 8th day of February 1899 whereby the said Court dismissed with costs the appeal of the plaintiffs from the judgment of His Honor the Chief Justice delivered herein on the 31st day of August 1898 And upon hearing etc. this Court doth declare that if within three months from the date of such motion security shall be given by the plaintiffs either in a bond or mortgage or personal recognizance of the value of 450*l.* sterling for the prosecution of the said intended appeal and for the payment of all such costs as may be awarded by Her Majesty her heirs or successors or by the Judicial Committee of Her Majesty's Privy Council to the parties respondent then the said intended appeal shall be allowed. [That is, *of course, allowed to be made.*] And this Court doth direct that upon the persons respectively in whose favour costs have been awarded by or by virtue of the judgment of the Full Court entering into good and sufficient security to be approved by the Prothonotary for the due performance of such judgment or order as Her Majesty her heirs and successors shall think fit to make respecting the same such persons respectively be at liberty to carry the said judgment into execution pending the appeal.”

With regard to Mrs. Gerschel's costs, I think she ought not to be called upon to pay any costs of this application. With that exception I make the costs of the present application costs of the appeal.

Solicitor for plaintiffs: *J. Woolf.*

Solicitors for defendants (except Burk, Lachal, Evans, and Gerschel): *Willan & Colles.*

Solicitor for defendant Julia Gerschel: *N. Levinson.*

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[PRACTICE COURT.]

TRUSWELL AND OTHERS *v.* WOODS.

Miner's right—Lapse—Machinery site—Title—Registration—Mines Act
(No. 1120)—*Special case—Procedure.*

In an application on summons before a warden to have it declared that the defendant had forfeited his machinery area, general evidence as to pegging off in 1870 uncontradicted by any evidence as to its irregularity held sufficient. Evidence of pegging off in accordance with the by-laws.

An omission by the holder of a machinery site to take out a fresh right on or before the expiration of the immediately preceding one does not absolutely invalidate the registration of the machinery site, provided that at the time such holding is attacked the holder of the site is also the holder of a mining right, and it is not necessary in such a case in order to validate his title to apply for the holder subsequently to mark out and register the site on a new application.

Vial v. Allender (23 V.L.R. 516) and *Abraham v. Della Ca.* (23 V.L.R. 517) discussed.

The Court will not on a special case stated by a goldfields warden decide questions in the case which are not raised by the facts.

SPECIAL CASE stated by a warden of goldfields at Ballarat.

By a warden's summons dated 27th September 1898 Truswell, Robert Ditchburn, William J. Lamb, Alexander Lamb, Robert B. Lamb, and John W. Truswell sought a declaration against Eccles Woods that the latter was in unlawful occupation of (*inter alia*) a machinery site at Lucky Woman's, Ballarat Valley, registered with the Mining Registrar for the Smythdale Division of the Mining District of Ballarat at Smythdale and numbered 476, and that he had forfeited all his right and interest in the machinery site upon certain grounds, so far as necessary for this report, were:—

1. That the defendant had not taken possession of the site in accordance with the Ballarat Mining By-laws.
2. That the defendant was not the holder of a miner's right at the time of taking possession of the site, and did not continuously since the registration of the site hold a miner's right.
3. That the defendant was not the holder of a claim for a water right on the 7th October 1898.

The case came on for hearing before the Warden on the 7th October 1898, when he allowed an amendment of the sum-

in order to raise the third ground and the latter part of the second ground.

Upon the hearing evidence was given which, so far as material to this report, is as follows:—

The Register of Mining Tenements in the Ballarat Mining District, Smythesdale Division, was put in evidence by the complainants, and entries in it showed the date of application for the machinery site to be the 31st day of March 1870, the date of taking possession the 30th March 1870, and the date of the certificate of application the 31st March 1870, the person to whom the certificate was issued the defendant, the date of the registration of the tenement 25th February 1871, and contained a reference to the register showing the miners' rights produced by the defendant to the Registrar. The Register of Holders, put in evidence by the complainants, showed that the defendant had produced to the Registrar a miner's right dated the 29th March 1870, and also various other rights dated in each successive year (except the year 1871) until the year 1898, the last right being dated the 31st day of May 1898. No evidence was given to show the period for which any of these rights had been issued. The days on which some of them were issued were distant a greater period than twelve months from the date of the last preceding right produced to the Registrar. The register did not contain any reference to any claim or water right held by the defendant at any time. The defendant gave *viva voce* evidence in chief on oath as follows:—"I am the registered holder of the machinery site. When I pegged it off I was the registered owner of a claim on Dreamer's Hill. I erected a battery and crushed once or twice on my own account. I then let the ground on tribute to ten men, who worked between them, I think, a year and six months. I crushed for them. After they had worked the claim out I worked at it for years. When I had worked it out I took out another registered claim on Dreamer's Hill in July 1886, and worked it off and on to within the past six months. I carted the stuff from there to my battery on the machinery area to be crushed." In cross-examination the defendant stated that the Register of Holders showed all the miners' rights held or taken out by him since registration of the

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machinery site, and he made the following statement:—"I do not hold any tenement other than the machinery area." The warden intimated that his decision would be for the defendant, but consented on the application of the complainants to state the questions set forth in the judgment for the opinion of the Supreme Court. The *Mining Statute* 1865 and the By-laws III. and VII. published in the *Government Gazette* on the 17th August 1866 and the 18th June 1869 respectively govern the present case, but the *Mines Act* 1890 and the present Ballarat By-law No. XI. are substantially identical in principle.

Starke for the complainants—On the first question: The machinery site was taken up according to the dates under By-law III., clause 45, which provides that the mode of taking possession and making application and registration of such sites shall be in every respect similar to claims, as to which see By-law VII., clause 11. The mode of taking possession is a fact peculiarly within the knowledge of the defendant in this case, and the onus is upon him to show that he complied with the by-law: *Palmer v. Chisholm* (a). The evidence of the defendant is insufficient; it is too general. It is quite consistent with the evidence that the by-law was not duly complied with. Moreover, the warden's question assumes that it was not properly proved that the by-law was complied with. Upon questions 2 and 3: The *Mining Statute* 1865, sec. 5, enables the holder of a miner's right to take possession (for gold mining purposes) of Crown lands, in accordance with the by-laws. The statute does not deal expressly with machinery sites, but By-law III., clause 45, provides for them, and the by-law is unimpeachable in any court of justice (see sec. 72). Under the by-law the owners of any claim or water right may take possession of and occupy as a site upon which to erect machinery any extent of Crown lands not exceeding 5 acres; consequently, a person who takes up a machinery site must hold—(1) a miner's right, (2) a claim or water right issued under the Act for some definite period of time not exceeding 15 years (sec. 4, Schedule Z). The general practice is to issue rights

(a) [1874] 5 A.J.R. 169.

for one year only, and in the present case the inference is clear that the rights were issued according to that practice. Title under the *Mines Act* depends on the holding and continuous existence of a miner's right: *Lennox v. Golden Fleece Co.* (b). Sec. 5 confers the right to occupy "during the continuance of such right"—that is, the right under which the Crown lands were taken possession of. Title begins and ends with the right in precisely the same way as in the case of an ordinary demise. The provision in sec. 14 of antedating new rights gives no further title. Sec. 8 is not against my argument. It protects several men's grounds in the hands of an association of persons if they hold sufficient rights to cover the ground, and does not deal with title. The By-law III., clauses 53 and 54, dealing with the loss of a miner's right and the registration of new rights on the expiration of old rights, does not give any new title, and By-law VII., clause 15, giving the right of transfer to any other person being the holder of a miner's right, does not deal with the duration of the original title. *Fattorini v. Band and Albion Consols* (c) seems to be opposed to my contention, but the point does not appear to have been argued. The case, however, is not opposed to the view that the continuous holding of a miner's right is essential for the maintenance of title under the Act, because in that case a miner's right, although not the right under which the claim was originally taken up, was in force during the whole period of possession. Every provision in the Act and by-laws contemplates the maintenance of a miner's right. Sec. 12 is unintelligible on any other view, and so is By-law LIV. The public revenue suffers if this contention be not maintained. *Abraham v. Della Ca* (d) establishes this contention in my favour. *Vial v. Allender* (e) no doubt overrules that decision, but solely on the ground that the case was governed by sec. 32 of the *Mines Act* 1890, which relates exclusively to residence areas. If it had not been for the provisions of sec. 32, the reasons of the learned Judges show that the decision in *Vial v. Allender* would have been different. A forfeiture of title once incurred under the *Mining Statute* is incurable: *Thompson*

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(b) [1874] 5 A.J.R. 18.

(d) [1897] 23 V.L.R. 338.

(c) [1883] 9 V.L.R. (M.) 1.

(e) [1898] 23 V.L.R. 516.

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v. *Begg* (f); *Clerk* v. *Wrigley* (g). Upon the fourth question By-law III., clause 45, is clear on this point. A machinery is an adjunct to a claim or a water right. The onus is on the defendant to prove his claim or water right. The fact is within his knowledge, and the evidence does not discharge his obligation.

A. H. McKean for the defendant—Upon the first question the complainants must establish the invalidity of the defendant's title. The second and third questions are decided by the case *Vial* v. *Allender*. On the fourth question it is submitted that the by-law is directory only.

Cur. adv. vu

A'BECKETT, J., read the following judgment:—This is a special case stated by a warden in a proceeding to have a claim declared that the defendant had forfeited a machinery area which he had taken up under the Ballarat by-laws. The question asked is—"Should the complainants have proved that the defendant did not take possession of the said machinery area by fixing on the ground firmly at each corner, or at a point as nearly as practicable to each corner of the land included in the said machinery area, a post projecting above the surface not more than three feet, or should the warden have found that the defendant took possession of the said machinery area in manner aforesaid? As to this the defendant gave some evidence of pegging the area in 1870, which in the absence of any evidence impeaching the regularity should be accepted as sufficient, and I therefore answer the question by saying that, upon the evidence before the warden, the defendant should be taken to have pegged the area in the manner required by the by-laws.

The second and third questions are as follows:—

2. Did the omission by the defendant to take out a miner's right on or before the expiration of the immediately preceding one absolutely invalidate the then existing registration of the said machinery area?

3. Did the taking out of a fresh miner's right after

(f) [1871] 2 A.J.R. 34.

(g) [1867] 4 W.W. & A'B. (C) at p. 82.

interval validate such registration (if invalid), or was it necessary that the defendant in order to validate his title should, subsequently to such omission, mark out and register on a fresh application?

These questions raise a point of great importance in relation to mining titles, and it is strange that it does not seem to have been the subject of direct decision until October 1897, when in the case of *Abraham v. Della Ca* (*h*), Hood, J., decided it. He did so adversely to the person whose title was affected by the break of continuity in the miners' rights, saying that it was clear that the holder of a residence area had to re-mark and re-register his holding if he allowed his miner's right to lapse, whether for an hour or for a year. More than twenty years before Mr. Justice Molesworth, as Chief Judge of the Court of Mines, in coming to a decision in favour of the claim-holder in possession, had stated that "he did not wish to express a general opinion on the very important point if the title under a miner's right liable to forfeiture from the omission to take one out is restored by one being taken out before any adverse proceeding." See *Summers v. Cooper* (*i*). In the year 1883, in *Fattorini v. Band and Albion Consols* (*k*), the same learned Judge appears to have decided that, notwithstanding a break in the continuity of the miners' rights, the defect might be effectually cured by the acquisition of another miner's right without re-marking. I say appears to have decided, because the decision rests upon inference to be drawn from the argument on behalf of the complainant. I am inclined to think, from the absence of subsequent decision, that this view was accepted as correct by miners and mining lawyers, who would otherwise have attacked titles in which the flaw might have been discovered. I should, however, have felt difficulty in coming to a decision differing from that in *Abraham v. Della Ca* but for the decision of the Full Court in *Vial v. Allender* (*l*), which is reported as having overruled it. Mr. Starke, who ably and exhaustively argued the case for the complainants, pointed out that *Abraham v. Della Ca* is not distinctly overruled, and that the decision in

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Vial's case turned upon the construction of sec. 32 of the *Mining Statute*, dealing with residence areas, a section which is inapplicable to the present case. He had to struggle with the position which it was necessary for him to take up, which he successfully maintained as counsel for the defendant in Vial's case, that *Abraham v. Della Ca* was undistinguished but was wrongly decided. I think it is possible to distinguish between the point actually decided in *Vial v. Allender* and the present case; but the opinions expressed by the members of the Court deal with the matter on broad grounds, not merely on the construction of sec. 32. The Chief Justice says "it would be a monstrous thing if, by reason of inadvertence or accident, the holder of an area failed to renew his miner's right for one or two days, such person should be prevented after the lapse of years from continuing his possession, owing to the badness of his title by reason of such failure. Such a result of things was foreign to the intention of the Legislature gathered from the Act and from the decisions upon it, and against one's sense of justice." The cautious utterance of the Chief Judge in *Summers v. Cooper* is also referred to. Following *Vial v. Allender*, I answer question 2 by saying "No;" question 3, by saying that it was not necessary that the defendant, in order to validate his title, should subsequently mark out his register on a fresh application.

Question 4 is as follows:—"Was it necessary that the defendant in order to hold the said machinery area, should be registered as the holder, in addition thereto, of a claim or water right?" I refrain from avoiding expressing opinions in the abstract on points not necessary to the decision of the present case. It appears that the defendant was the owner of a claim when he took up the machinery area, and I answer this question by saying that nothing in the case to invalidate the title of the defendant by reason of not having been owner of a claim or water right. I direct that the costs of the special case be paid by the complainants.

Solicitor for complainants : *Bateman* (for *Phillips & Co.* Ballarat).

Solicitor for defendant : *James McKean*.

R. H.

[IN CHAMBERS.]

DUNN v. SUTHERLAND.

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March 22.A'Beckett, J.

Practice—Particulars—Action for breach of promise of marriage—Sexual intercourse—Admission—Alleged unchastity before breach—“Rules of Supreme Court 1884”—Order XIX., r. 7.

In an action for breach of promise of marriage the plaintiff alleged that relying upon the defendant's promise she permitted him “to debauch and carnally know her and as a result thereof” she was confined of a child. The defendant admitted the promise and intercourse, but alleged that before breach he discovered plaintiff to be unchaste, and that the intercourse occurred on a date which precluded a child from being the result of that intercourse.

Held, that the plaintiff should give particulars of the time or times and place or places of the intercourse alleged by her.

SUMMONS in Chambers.

Agnes Mary Graham Dunn brought an action against Joseph Sutherland in which she claimed 1000*l.* damages for breach of promise of marriage. The 4th paragraph of the statement of claim ran thus:—“Relying upon defendant's said promise of marriage the plaintiff permitted the defendant to debauch and carnally know her and as a result thereof the plaintiff was confined of a child on the 11th December 1897.”

The defendant denied “that the plaintiff permitted him to debauch and carnally know her as in paragraph 4 alleged or at all,” and denied “that as a result thereof the plaintiff was confined of a child on the 11th December 1897 or at any time.” He by the 5th paragraph of the defence admitted that he refused to marry the plaintiff, but alleged that he did so “inasmuch as after the promise referred to in the statement of claim and before the alleged breach the defendant discovered that the plaintiff was not a chaste and modest woman as he believed her to be at the time of making such promise.”

On a request by plaintiff's solicitor for particulars under the fifth paragraph of the defence the following were supplied:—

- (1.) The defendant discovered that the plaintiff was not a chaste and modest woman in or about the month of December 1897.
- (2.) The defendant does not at present know and is unable to state with what person or persons the plaintiff had been unchaste or had misconducted herself.

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The plaintiff refused to give particulars of the place where and time of day when it was alleged the plaintiff permitted the defendant to debauch and carnally know her.

Application was now made on summons for an order that these particulars be given.

No affidavit was filed by the defendant upon the matter.

Schutt for the defendant in support—A Judge will order such particulars as a party can give. It is no answer to the application that the party applying is or ought to be in possession of the particulars he seeks. Now that the defence is put in, the principle of *Hughes v. Logan* (a) applies, that an affidavit is not required from the defendant for the purpose of pledging his oath to the truth of the defence, but merely to show his ignorance.

[A'BECKETT, J. If the Court has to assume that the defence is true it is evident that the defendant is ignorant. Unless the Court either presumes this or is satisfied that his defence is true it would require to know that the facts are not within his knowledge, and that decision of mine would apparently be wrong unless the Court was justified in assuming the defence to be true. I assumed for the purposes of the summons in that case that the defence was true and that the defendant did not promise.]

[*Bryant* — There is evidence in another Court that the defendant in this case admitted that he had intercourse with the plaintiff.]

That evidence is not before the Court here, and it is not admitted.

[A'BECKETT, J. It does not appear from my judgment in *Hughes v. Logan* whether in *Thompson v. Birkley* (b) the defendant denied the seduction.]

He had not denied it. The Court in that case said it would not order particulars until an affidavit was filed. The action was one of seduction. The plaintiff was not able to know of the matters. The plaintiff's contention is that the defendant is supposed to know, but a party is entitled to particulars of the allegations of the other party. It is no answer to say he knows

(a) [1888] 14 V.L.R. 647.

(b) [1883] 31 W.R. 230.

the facts: *Odgers on Pleading* (2nd ed.), p. 145. He is entitled to know the outline of the plaintiff's case. We wish to bind her down to a definite story. The English cases on seduction where particulars were refused until an affidavit was made should not be followed. In similar cases—*e.g.*, where adultery was alleged—particulars have been ordered: *Coates v. Croyle* (c).

[A'BECKETT, J. In the latter cases there would be a reason. In the Divorce Court the statement that adultery was or was not committed is one in which an oath is not required. I do not think divorce proceedings form a satisfactory analogy.]

The defendant says that he certainly had intercourse with the plaintiff, but neither under the circumstances nor with the result alleged.

Bryant for the plaintiff to oppose—The cause of action is breach of promise of marriage, and there is a claim for damages for seduction under the promise. The defence admits the breach, with a subsequent discovery of unchastity. The defendant is in this difficulty—the allegation of seduction and the particulars only go to the question of damage. If the application is granted the particulars do not assist his defence. If the unchastity was with him then he is not therefore entitled to refuse to marry the plaintiff. There is no suggestion of amendment or of payment into Court, and, unless with this object, particulars of damage are not ordered: *Horne v. Hough* (d); *Frost v. Brook* (e). In such a case as this, where it is manifest that if they are true the defendant knows the details, the Court will not order particulars unless an affidavit of denial is made. In *Thompson v. Birkley* (f) the rule is laid down by Watkin-Williams, J., that in this class of cases where a question of sexual intercourse arises particulars are not granted as a matter of course but only where there is an affidavit that the allegation of intercourse is untrue. This was followed in *Hanna v. Keers* (g). In *Dawson v. Swords* (h) Hodges, J., considers *Hughes v. Logan* (i) and distinguishes the cases.

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(c) [1888] 4 *Times* L.R. 735.

(d) [1874] L.R. 9 C.P. 135.

(e) [1875] 23 W.R. 260.

(f) 31 W.R. 230.

(g) [1896] 2 Ir. R. 226.

(h) [1889] 10 A.L.T. 255.

(i) [1888] 14 V.L.R. 647.

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A'Beckett, J.*Schutt* in reply was not heard.

A'BECKETT, J. This is a summons which involves the consideration of principles as to discovery in the abstract. I should have felt such difficulty in dealing with it that I have had to reserve my judgment in order to consider each of those principles if there were not exceptional facts in the case which relieve me from the difficulty of considering the question in the abstract. This is a case which stands on a footing of its own. The allegations are not merely with reference to the damage, not merely as to the fact of intercourse, but have reference to the result of that intercourse, a question whether the child was the result of that intercourse would be materially affected by the date at which that intercourse had taken place. It appears that this defendant has admitted the fact that intercourse had taken place, but, I presume, at such a time as would exclude the possibility of his being the father of the child, which is one of the elements of damage in all events he has admitted intercourse. Then it is said that the Court under these circumstances imposes the condition that before a defendant may ask for particulars he should swear that he did not have any intercourse. Under the circumstances of this case this obviously cannot be done, and the effect would therefore be to exclude the defendant altogether from obtaining information as to the time when the plaintiff alleges the intercourse took place. Apparently it is a case in which it would be reasonable that the defendant should know, with reference to the particular damage which is sued for, *when* she asserts that *where* she asserts the intercourse took place. The rule is only requiring particulars with regard to payment into court and so on, applying to damage of another sort, may be distinguished when we think of the special nature of the damage in this case. It is damage in which the defendant's answerable must be concerned as well as the plaintiff, and I think he should know when it is he is alleged to have committed these acts. So that as to what particulars will be sufficient is unnecessary now for me to express any opinion. A degree of particularity as to date can scarcely be expected, and ex-

so far as circumstances permit should not be required, though it should be specific as to the date of the first occasion on which intercourse took place. That is a matter which the parties might reasonably be expected to know. I think I should make an order that the plaintiff do within ten days deliver to the defendant's solicitors particulars of the time or times when and place or places where she alleges sexual intercourse took place between herself and the defendant. The earliest date and the place should be stated. I think the greatest latitude should be allowed as to the other dates, because generality of statement is to be expected. But some guide ought to be given to the defendant as to when it is alleged he did these acts.

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Application granted.

Solicitors for the plaintiff: *Bruce & Robinson* (for *Crothers*, Wycheproof).

Solicitors for the defendant: *Stawell & Nankivell* (for *Stawell, Nankivell & Green*, Charlton).

R. H. C.

IN THE WILL AND ESTATE OF WILLIAM SNELLING, DECEASED.

Probate practice—Lunatic executor—Executor becoming lunatic before grant—Lunatic patient—Master in Lunacy—Administration c.t.a. durante animi vitio—Dispensing with bond and sureties.

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Where an executrix who was practically the sole beneficiary under the will became a lunatic patient before applying for a grant of probate, the Court, without requiring notice to the next of kin of the lunatic patient or to anyone else, granted administration *c.t.a.* to the Master in Lunacy for the use and benefit of the lunatic patient until she became of sound mind, and dispensed both with the usual administration bond and sureties.

MOTION for the grant of letters of administration *cum testamento annexo* of the estate of William Snelling, deceased, to the Master in Lunacy for the use and benefit of Francis Anne Snelling, the executrix and sole beneficiary named in the will during the disability through lunacy of the executrix, and until such time as she became of sound mind, and also for an

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order dispensing with the usual administration bond and sureties.

The deceased left real estate valued at 730*l.* and personal estate valued at 3202*l.* 19*s.* 4*d.* By his will he gave, devised and bequeathed all his real and personal estate to his wife absolutely, and provided that if she married again before selling the real estate it was to remain to her separate use without any interference by her husband, and that no interest whatever in it should at any time either before or after her death vest in such husband, but in the event of her dying without having disposed of it by will to the exclusion of such husband, the portion thereof to which she might at the time of her death be entitled should descend to her heirs, always excluding such husband, and appointed her executrix.

The testator died on the 4th February 1899. On the 6th February 1899 his widow, Frances Anne Snelling, was admitted to the Kew Asylum for lunatics as a lunatic patient, and still remained in the asylum. No inquiry had been had. After publication of an advertisement inviting application would be made as above the Master in Lunacy made the application to the Registrar of Probates on the usual materials, in addition to the facts above stated. The Registrar granted the application. Upon the next day the Registrar wrote to the applicant's solicitors as follows:—

“ *Re* SNELLING'S WILL.

“Since noting the grant herein, I have had some doubt upon the matter, and shall take time for further consideration. I observe that *In the Estate of Boyd* (a) (see also *In the Estate of Barthold*) (b), the fact that the administrator was confined in the lunatic asylum was not accepted as absolute proof of unfitness to act. In that case, too, one of the next of kin was the applicant. I have some hesitation as to concluding that the next of kin of the executrix herein are not entitled to notice of the application. The application being novel, I perhaps conclude to let it go to the Court.”

(a) [1885] 11 V.L.R. 117.

(b) [1895] 21 V.L.R. 107.

An affidavit by Dr. William Beattie Smith, the Medical Superintendent of the Asylum, was then filed. It stated that since her admission to the asylum as a lunatic patient, on the 6th February 1899, Frances Anne Snelling had been continually under his care and observation. That she was quite demented and refused to converse with anyone or take interest in anything; that her bodily health was infirm, and she was confined to a wheel chair. In his opinion she was totally incapable of managing herself or her affairs or of doing any act whatever requiring thought, judgment, or reflection, and it was unlikely that she would recover the use of her mental faculties for some considerable time, if at all. On receiving this affidavit the Register of Probates further considered the matter, and decided that owing to the novelty of the application he would refer it to the Court.

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Agg now repeated the application to the Court—The Registrar seems now to be satisfied as to the lunacy of the executrix.

[HOLROYD, J. The affidavit of the medical superintendent of the asylum would seem to be the best available evidence as to that.]

The Registrar seems to be in some doubt as to whether notice should be given to the next of kin of the executrix. This it is submitted is unnecessary. They have no interest. The whole of the testator's property goes to her under the will. In England, prior to the passing of the *Probate Act* of 1857, sec. 73 (20 & 21 Vict., c. 77), which is not in force in this colony, the Ecclesiastical Court would have granted administration *c.t.a.* to the committee (if any) of a lunatic executor without notice to his next of kin. As laid down in 1 *Oughton's Ordo Judicorum*, tit. 219, s. 1 n. (a), p. 324, Ecclesiastical Judges granted letters of administration *durante corporis aut animi vitio*. This is relied upon by the various text writers and in some of the decisions as a correct statement of the law, though until 1895 no grant during the debility of body of an executor was made, so far as the reported cases show: See *Re Ponsonby* (c). According

(c) [1895] P. 287.

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to the text writers grants were often made during the d of mind of an executor, usually to the committee of his The correct exposition of the law is stated in *Collins Lunacy*, p. 634. Prior to the above section of the *Probate* 1857, on which reliance has been placed in later cases. It in the same way in the text-books since that Act: See *Tr and Coote's Probate Practice* (10th ed.), 142, 143, where it laid down that no declaration is required from the com and his sureties do not justify. The only doubt appears as to what notices should be given where an executor or a istrator becomes lunatic after the grant. The Master in L in this colony has the management of the estate of lunatic patients (see *Lunacy Act* 1890 (No. 1113), sec. 131) and powers and authorities given to the committee of the estate lunatic (see sec. 180).

[HOLROYD, J. Would he have the management of estate which the lunatic patient was trustee? Would not application have to be made to the Court for the removal of the trustee if he were lunatic, and the appointment of a new trustee?]

Yes. In this case, however, after the debts of the testator which amount to only 48*l.*, were paid, practically the whole of the testator's estate would belong to the lunatic patient, and the Master would have control of it. But these sections are only referred to to show that the Master in Lunacy has the same powers in the case of a lunatic patient, where there has been no inquisition of lunacy, as a committee in England, where there has been; and it is submitted that, as the English Court would usually grant administration *c.t.a.* in a case like the present to the committee of the lunatic executor, this Court should grant it to the Master in Lunacy.

[HOLROYD, J. That seems proper. He is appointed for the purpose of managing the estates of lunatics. He is a proper officer.]

In re Boyd and *In re Barthold* are both distinguished. They were intestacies, administration had already been granted, and other persons were interested. Here, except creditors, there is no person having any interest other than the executrix.

HOLROYD, J. I will grant the first part of the application.

Agg—It is also asked that the bond and sureties be dispensed with. It is, as stated in *Tristram & Coote*, the practice where such a grant is made to the committee. The Master is a public officer who gives security for the due performance of his office. The creditors are practically assured by the State.

HOLROYD, J. I will grant the application as asked.

Solicitors: *Stawell & Nankivell*.

A. J. A.

[IN CHAMBERS.]

PEARCE v. TOWER MANUFACTURING AND NOVELTY COMPANY
(No. 2).

Costs—Taxation—Solicitor acting for an agent of company—Costs of agent not costs of company—Legal Profession Act 1891 (No. 1216), s. 8—Counsel's fee—“Substantial attendance” to case by counsel.

The plaintiff sued a foreign company in respect of a contract to purchase goods ordered by the plaintiff from an agent of the company. The writ was served as substituted service upon the agent. The agent stated that he was not authorized by his appointment to accept service of a writ or to enter an appearance, and he instructed a solicitor, S., to apply to set aside such service. An order was made setting aside such service, and the plaintiff appealed therefrom to the Full Court. Notice of appeal was served upon the same solicitor, S., who had appeared as instructed by the agent, and S. again wrote, stating that he was not authorized to accept the same on behalf of the company, and that the plaintiff could proceed at her peril. The plaintiff's solicitor by letter informed S. that the appeal was not to be proceeded with. S. then wrote, asking for payment of costs, and stating that if this were not done he would move to have appeal dismissed. The plaintiff's solicitor wrote agreeing to pay the taxed costs, but in the meantime S. served notice of motion to have appeal dismissed, and it was then agreed that this latter motion should be allowed to lapse without costs on either side. Counsel was briefed to appear on the appeal before the Full Court before the notice of the abandonment of the appeal, and he appeared and the appeal was dismissed with costs to be paid to the defendant company. S. then had the defendant company's costs taxed under the order of the Full Court. Upon a summons by the plaintiff that the taxation be reviewed on the ground that the costs incurred by S. were the costs of the agent and not the costs of the company,

Held (affirming the judgment of HOOD, J., A'BECKETT, J., *dissenting*), that S. was acting for the agent, and that the taxed costs incurred by him were not the costs of the company, and that the plaintiff was not bound to pay the same.

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Per Hood, J. That sec. 8, sub-sec. (1) of Act 1216, which provides for return of fees by counsel who has not given substantial attendance to a case, does not apply where the brief has been delivered and the action is set down for trial, compromised before or at the hearing.

THIS was a summons on behalf of the plaintiff to require the taxation of a bill of costs. The plaintiff had sued the defendant company, and served an agent of the company as substituted service. This service was set aside by the Full Court, and the facts relating to this part of the case are fully set out *ante*, p. 506. The agent, Lewis, at that time stated that he was not authorized by the defendant company to accept substituted service or to enter an appearance, and he instructed Mr. Simpson to act as solicitor to set aside such service. The plaintiff then appealed to the Full Court from this decision of Hood, J. Notice of this appeal was served on Simpson, who wrote in reply stating that he was not authorized to accept substituted service, and that notice of appeal on behalf of the defendant company, and that the plaintiff must proceed at her peril; he stated that he wished him to apply for security of the costs of the appeal. On the 22nd January 1899, the plaintiff's solicitor wrote to Simpson that he did not intend to proceed with the appeal; Simpson then wrote asking for an undertaking to pay the costs, and Simpson not he would move to have the appeal dismissed, without costs. The plaintiff's solicitor wrote agreeing to pay the taxed costs, but in the meantime notice of motion had been served; Simpson then agreed that this notice of motion should be allowed to lapse without costs on either side. Counsel had been briefed for Simpson to appear on the appeal before the notice of abatement. Notwithstanding the correspondence counsel appeared before the Full Court, and the plaintiff's appeal was dismissed with costs. Simpson then had the costs of the defendant company taxed under the order of the Full Court, and a summons was taken out to review the taxation, on the ground that the costs incurred were not the costs of the defendant company but the costs of Lewis. Objection was also taken to the fee to counsel, 10*l.* 10*s.*, on the ground that he had not given substantial attendance, in that he merely appeared to have the appeal dismissed.

A letter from the defendant company was read, showing that the company, upon hearing of the position taken up by its agent practically repudiated his proceedings, and directed him to compromise the action at once.

M. P. Fox in support of the summons.

W. H. Williams to oppose.

HOOD, J. The more this case is looked at the more I am confirmed in the antagonistic view I entertained as to the merits of the defendant. The defendant company carried on business in America, and had an agent, Lewis, with very limited powers in New South Wales. Lewis, while on a visit on the company's business to Melbourne, entered into certain negotiations as to the supply of goods to the plaintiff. A dispute arose concerning these goods, and the plaintiff eventually attempted to serve the writ in this action on the agent Lewis in Sydney as substituted service. The agent then instructed solicitors to apply to set aside that service, swearing as strongly as he could that he was not authorized to accept service or to appear for the defendant company. I came to the conclusion that the company was not carrying on business in Victoria merely because it had a traveller here, and I set aside the service, expressing my opinion that it was a mean, contemptible objection. The plaintiff gave notice of appeal from my decision. The notice of appeal was served on the same solicitor who appeared for the agent Lewis in the proceedings before me. He wrote a letter saying that he was not authorized to accept service on behalf of the company, and that the plaintiff could proceed at her peril. If the matter stopped there I should have thought that there was something in the position adopted by Mr. Simpson. But he went further and said that Lewis wanted security for costs, and practically stated—"If you proceed I will fight you on behalf of Lewis." He did fight on behalf of Lewis. The plaintiff abandoned the appeal, and the costs then were the costs of Lewis, not the costs of the company. The solicitor for Lewis appeared before the Full Court and had the appeal struck out with costs. That order,

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however, is an order for the costs of the company, not the costs of Lewis. I am pleased to find that the company, being informed of what had taken place, acted in a *bona fide* proper way, and practically repudiated the actions of Lewis directed him to compromise the matter at once.

As to the second point, there is nothing whatever. Counsel is not bound to return his fee upon the settlement of the case after delivery of brief. I hold that these costs are not the company's costs, and that the plaintiff is not obliged to pay them.

W. H.

From this order the defendant company appealed.

T. A'B. Weigall and *W. H. Williams* for the appellants.

M. P. Fox for the respondent.

During argument counsel referred to *Chitty's Practice* (ed.), pp. 149, 696 ; *Annual Practice*, 1899 ; Order XII., r. 1. *Mayer v. Claretie* (a).

WILLIAMS, J. This is an appeal from an order of Hood made upon a summons to review a taxation by the taxing officer of the costs of an appeal, the appeal being by Lydia Pearce against the respondent the Tower Manufacturing and Novelty Company. These costs were taken in to be taxed, and on the taxation the taxing officer overruled that objection, and then this appeal came before Hood, J., and Hood, J., who had knowledge of the previous litigation between these parties, upon consideration of the case and the evidence, came to the conclusion that that order was a good one, and that these costs were not the costs of the company incurred in resisting that appeal. Now, my brother Hodges and I think that the decision of Hood, J., is right. In any rate we are not satisfied that it is wrong—and that there was evidence to justify the conclusion at which he arrived.

(a) [1890] 7 T.L.R. 40.

and little to displace the conclusion. At the very outset, when Lydia Pearce was commencing her appeal, she had to serve notice of appeal upon the opposite party. This is a necessary step. She proceeded to attempt to effect service of the notice of appeal by delivering it to Simpson, whom she believed to be the solicitor for the defendant, the Tower Manufacturing, etc., Company. As soon as this is attempted the first thing she got was an intimation by letter from Simpson to her solicitor Fox, in which Simpson states—"I desire to inform you that I am not authorized to accept service of the proceedings therein on behalf of the defendant company, and your client must proceed therein at her peril." There is a distinct statement of fact. Simpson, being served with notice of appeal, says in effect—"It is of no use serving me with this. I have no authority to accept service of notice of appeal, and if your client chooses to proceed she does so at her peril—that is, she can get no costs out of my client, because I have no authority." The first charge on the bill of costs is, "Received notice of appeal herein and perusing"—the very thing he says he is not authorized to receive. He adheres to this objection throughout. In his letters he persists in this objection until the last. There is that affirmative and distinct evidence—the statement of Simpson—that he had no authority, and there is nothing to displace it. There is ample proof to justify Hood, J., in coming to the conclusion he did. It is said that the letter to the plaintiff from the defendants in the United States affords some evidence to the contrary, or evidence of ratification of Simpson's acts. As I read it, it amounts to this—that the defendants say:—"The first intimation we got that legal proceedings had been taken, and that litigation was going on between the plaintiff and us of any description was when we got the newspapers and clippings you sent us, and, what is more, we very much disapprove of them." (His Honor read the letter and continued):—"The defendants say that they would rather have lost the whole consignment than resist a righteous claim. They would rather have settled these matters out of Court. They had no idea that litigation was going on until Pearce's letter arrived, and they state, "We have cabled to Lewis directing him to

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adjust or compromise the matter in some way that will be satisfactory to you."

I should construe the letter as one disapproving of the litigation which had been launched, and rather repudiating it. If we take that view of that letter, what remains? The statement of the solicitor that he was not authorized, and not to dislodge that statement. It is said there is the undertaking to pay costs given by Fox. If this be read strictly, it is an undertaking to pay *defendants'* costs, and the whole effect of the judgment of Hood, J., is that these are not the defendants' costs because the evidence shows the solicitor who incurred them was not authorized to incur them. For these reasons I think the decision of Hood, J., right, and that this appeal should be dismissed with costs.

HODGES, J. I have nothing to add. I concur with the judgment of Williams, J.

A'BECKETT, J. (*dissentiens*). This is a question as to what the taxing officer should have done with regard to an order of the Full Court directing that an appeal should be dismissed with costs—(His Honor read the order). The order came before the officer. An objection was then raised by the plaintiff that no taxation could be allowed, because the solicitor who instructed counsel to appear for the purpose of procuring the order to be made was not authorized by the Tower Company to take this proceeding. That is, I think, a very strong position to take up, and requires strong evidence to support it. The reason for saying that the solicitor was not authorized, and therefore that the company was to get no costs, were first, the letter which had been written by the company, and referring to previous litigation between the parties. This letter may be differently construed. The impression left upon my mind was that it was intended to say, "We know nothing of the merits of the dispute. We do not like litigation, we are sorry for it, and we have told our agent to settle it at once." It does not say that the person who was their agent in the country was acting contrary to instructions. It merely expresses sorrow

the litigation had taken place. The letter, I think, comes to nothing. It is written, as is pointed out by counsel, so that a person with whom the company may be doing business later on should be pacified. The only other thing is this, that Simpson in a letter, while the appeal was going on, says—"I desire to inform you that I am not authorized to accept service of notice of appeal herein on behalf of the defendant company, and your client must proceed after such notice at her peril. Mr. Lewis, however, wishes me to apply for the usual order for security for costs of appeal unless he" That is to say—"As I understand it I have no authority to accept service. I have authority to obstruct you in every way I can, and Lewis authorizes me to continue this procedure." There had been, previously, an order for service of the writ set aside by Lewis upon the ground that the service upon Lewis was not a proper service. That proceeding was recognized as one taken on behalf of the company, and I do not think it should be said that Lewis and Simpson were taking any inconsistent course. They say—"We are defending this action by every means in our power, and amongst these means are entitled to say that we were not by the defendant company authorized to receive notice." So that I think that the evidence upon which the taxing officer was told in this order to tax no costs at all was insufficient. There is also the further fact that Fox, the plaintiff's solicitor, had given an undertaking or offer to pay these costs, which really and distinctly are part of the costs in the appeal which he was asked to tax. That is another reason which would entitle the company to these costs. When the order spoke of the payment of costs it was recognized that up to that point Simpson's costs were those of the company. I think there was sufficient reason why the taxing officer should tax these costs.

Appeal dismissed with costs.

Solicitors for respondent : *Fox & Overend.*

Solicitor for appellant : *H. W. C. Simpson.*

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FALKINGHAM v. HARBISON.

*Practice—Supreme Court—Breach of trust—General account—Parties—Pr
of equity—Judicature Rules—Co-trustees—Survivor of two trustees—
representatives of deceased trustee—Non-appearance of some defendants—
of statements of claim—Setting down action on motion for judgment—
XIII., r. 12—Order XXVII., rr. 11 and 12.*

Where beneficiaries wish to recover in respect of a breach of trust by t
more trustees, the cause of action is severable, and they may bring an
against one or more of them without making the others parties; but if, wi
claim in respect of a breach of trust, there is claimed a general account,
trustees or their representatives are necessary parties.

Coppard v. Allen (2 De G. J. & S. 173) followed.

Where, by a principle of equity, and not a mere variable practice
Court, a suit used to be regarded as abortive unless certain persons were
parties, the Judicature Rules cannot do away with the necessity of such p
being parties.

It is not, under the Judicature Rules, the duty of a defendant who tal
objection for want of parties to take out a summons to have them adde
may take the objection by his defence, argue it at the trial, and if succe
entitled against the plaintiff to costs of and occasioned by an adjournm
add them as parties.

Where two executors of a deceased trustee are, with the surviving t
and certain of the beneficiaries, made defendants to an action for breach of
and general accounts, and do not enter an appearance, two statements of
must, under Order XIII., r. 12, be filed against them, an affidavit of such
made, and the action must be set down on motion for judgment against
under Order XXVII.

ACTION by George Falkingham the younger and John A
ander Falkingham, by their next friend George Falking
Travers Hartley Vaughan Rudduck Falkingham, Ha
Florence Elizabeth Pain, and the said George Falking
certain of the beneficiaries under the will of Mary Ann
deceased, against William Harbison, who was the surv
of two executors and trustees appointed by the will, Mabel
Elizabeth Holland, Florence Martha Eleanor Falkingham, I
Ann Vaughan Falkingham, Mary Burns, Mary Ann Madd
Sarah Elizabeth Darley, and Ruth Falkingham, alleging ce
breaches of trust by both Harbison and the deceased tru
Charles Stone, and claiming administration of the estate b
under the direction of the Court; that for this purpos
proper accounts might be taken, directions given, and inqu
had, and that the defendant William Harbison might be ord

to repay or replace the moneys with interest as to which the various breaches of trust were claimed; that an inquiry should be made as to certain profits alleged to have been made by the defendant William Harbison out of moneys of the estate, and that he be removed from the trusteeship and another trustee or trustees be appointed in his place.

By his defence the defendant Harbison took the objection that the personal representatives of the deceased trustee, Charles Stone, were necessary parties to the action.

Goldsmith and Bryant for the plaintiffs.

Isaac A. Isaacs (A.G.) and *Weigall* for the defendant Harbison.

Agg for the other defendants.

After the pleadings were read and an immaterial amendment made at the plaintiff's request,

The *Attorney-General* took the objection that the representatives of Stone were necessary parties to the action:—If they are not parties there would have to be further litigation, to which it is not fair to subject the defendant Harbison. If judgment goes against him he would have to bring an action for contribution against Stone's representatives and prove the same facts.

[MADDEN, C.J. Is this not a good objection? And being taken on the pleadings, ought it not to be acceded to?]

Goldsmith—The plaintiffs make no claim against Stone or his estate. We submit that the plaintiffs are entitled to go for breach of trust and general accounts against one of several executors and trustees without making the others parties. If the defendant Harbison for his own protection desires the presence of Stone's representatives there are ample means provided by the Rules for his getting them: *Re Harrison* (a).

[MADDEN, C.J. That is a case merely for an account, but

(a) [1891] 2 Ch. 349.

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here you ask for the administration of the estate and v other matters including Harbison's removal from the tr ship. It is laid down in *Calvert on Parties* that it was nee to bring all the trustees before the Court where a breach of not by one trustee only was charged. I do not know reason for departing from that where one of the tr who are alleged to have committed the breach of tr dead.]

Even if it were now correct law the difficulty is i case got over by omitting, as the plaintiffs have done, to relief against Stone's estate. But it is submitted that si *Judicature Act* the action is not to abate by reason of w parties. If any party desires the presence of another he take out a summons in Chambers to have him added.

[The Attorney-General—In *Williams v. Sandy* (b) *Robertson v. Wealth of Nations G.M. Co.* (c) the same arg to similar objections was unsuccessfully raised.]

There are no special circumstances here which make representatives (if there are any) necessary parties to the and the latest decision in England, where the courts have been familiar with the *Judicature Act* and Rules th Courts were at the time when the two cases cited Attorney-General were decided, says that they are not th necessary parties, and that if they were they ought to be in Chambers. Our cases do not show that they are ne parties.

[MADDEN, C.J. I see that in *Robertson v. Wealth of M Gold Mining Company* this precise point was taken, l late Mr. Justice Webb did not regard it, but followed t rule in equity.]

Yes, he took the view that the objection co raised and given effect to at the trial—in other allowed a plea in abatement, which the *Judicature Rul* hibit.

[MADDEN, C.J. The universal rule in equity was t trustees must be present when you charged all with a br trust. They were jointly liable for the breach of tru

(b) [1887] 13 V.L.R. 368.

(c) [1888] 14 V.L.R. 584.

were all made parties that contribution might be made amongst themselves. It is certainly desirable, and I think only fair, that everything should be dealt with in one action, rather than put one of the trustees to re-establish all the same facts in a suit for contribution.]

The plaintiffs do not want them—the defendant trustee has power to make them parties in order to get contribution if he wants it.

[MADDEN, C.J. It is not a question of what the plaintiffs want, but what the justice of the case requires.]

The main breaches of trust have relation to the defendant Harbison's own dealings—his borrowing of the trust moneys, and his making profits out of supplying materials for rebuilding and repairs. It is submitted that the plaintiffs are entitled to go for judgment against him alone for that for which he is liable.

MADDEN, C.J. I have looked into this matter, and I think the suit is rightly framed and does not require any amendment. The rule in equity appears to be this:—In *Walker v. Symonds* (d) Lord Chancellor Eldon says—“When three trustees are involved in one common breach of trust, a *cestui que trust* suffering from that breach, and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees.” That has been acted upon in subsequent cases, and made plainer in the case of *Wilkinson v. Parry* (e). In that case a similar objection that the suit was defective for want of parties was raised, and overruled by the Master of the Rolls, and the reporter adds this note—“Though the general rule of the Court is that all who are jointly liable with the defendants to satisfy the plaintiff's demand, ought to be parties to the suit, yet cases of breaches of trust seem to have been an exception, and it has been held that a *cestui que trust* may proceed against the surviving trustees alone, without bringing before the Court the representatives of deceased trustees who were involved in the same acts of misconduct. In *Ex parte Angle* (f) an application was made against the survivors of

(d) [1818] 3 Sw., p. 75.

(e) [1828] 4 Russ., p. 274.

(f) [1740] Barnard Ch. Rep. 425.

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certain persons, who, under 4 Ann., c. 14, had been appointed managers of briefs issued for the relief of the sufferers by a great fire. The managers had originally been seventeen in number, but seven of them were dead ; and it was submitted on the part of the survivors that the representatives of the deceased managers ought to be brought before the Court. But Lord Hardwicke's opinion was that it was not necessary to bring those representatives before the Court, that an order for accounting ought to be made against the survivors ; that these managers were to be considered as one body, and that they were each of them answerable one for the other, "for which reason" said he, "the objection, in relation to the bringing the representatives of the managers that were dead before the Court, was quite immaterial." The reporter then quotes the statement of Lord Eldon in *Walker v. Symonds*, which I have read. And in the case of *Wilson v. Moore (g)*, where the representatives of a dead trustee were not added, the Master of the Rolls said— "All the proper parties, therefore, are before the Court. It has been said that no decree can be made in this suit against the representatives of Mr. Marryat, since the party primarily liable is a defendant against whom no relief is prayed ; but it is a misapprehension to suppose that any persons concerned in a breach of trust are primarily liable. All parties to a breach of trust are equally liable, and if the Court should be of opinion that the widow has been guilty of a breach of trust—though there is nothing, so far as the case has proceeded, to induce the Court to come to that conclusion—the decree would be as much against her as against the representatives of Mr. Marryat ; but the plaintiffs have a right to proceed against such of them as they think fit."

[*The Attorney-General*—She was in fact a party.]

Yes ; the rule is summed up in *Calvert on Parties to Suits in Equity*, p. 299, thus :—"It must be observed that, although a plaintiff is allowed to bring before the Court a person who has obtained possession of the assets of the deceased by collusion with the executor, he cannot be compelled to do so. An executor by his misconduct cannot divide his own

(g) [1832] 1 My. & K., pp. 142, 143.

responsibility with another person, nor impose upon those who are suing him for the satisfaction of their claims against the assets of the deceased the obligation to make anyone else a defendant. He and the person thus holding the assets are subject, as fraudulent trustees are, to a separate liability. The new liability has been created, not by contract, but by tort; and it seems to have been always a principle in Courts of Equity that persons whose responsibility arises out of a tort may be separately sued." The principle laid down by those cases appears to be this: if the liability arises from some tortious act of the trustees the liability in equity as well as at law is always separable. In this case the charge against the deceased trustee is no more than a narrative of the transaction—nothing is claimed against him. As that is so I do not think I should have authority to stop the action against an unwilling plaintiff merely for the absence of the representatives of a deceased trustee.

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The Attorney-General—Those cases and that principle apply where there is only a breach of trust alleged, and relief in respect of it alone claimed. But where, as here, a general account is asked for it is different: *Coppard v. Allen* (h); *Calvert on Parties to Suits in Equity*, 171.

[THE CHIEF JUSTICE. The case of *Coppard v. Allen* recognizes the rule I have been referring to, but it also shows that where a general account is asked for as well as the declaration of and relief for breach of trust, all the trustees and their representatives are necessary parties. Is not that so, Mr. Goldsmith?]

Goldsmith—It is so if, as indicated in *Re Harrison*, special circumstances are shown. The case of *Coppard v. Allen* was referred to in that case. The representatives of Stone were not necessary parties in the first instance. The defendant Harbison, if he wished them joined, could add them under rule 11 of Order 16, as was also decided in *Re Harrison*, cited as good law in the *Annual Practice* 1899, p. 164.

(h) [1864] 2 De G. J. & S. 173.

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The Attorney-General—The distinction is clearly shown at page 172 of *Calvert on Parties*, where it is stated that in cases of general administration all responsible persons must be made parties.

MADDEN, C.J. I have come to the conclusion that the case is one in which the principle that circumstances alter cases is very well illustrated. I was of opinion that, in cases of breach of trust alleged against trustees, there was a several cause of action against each trustee, and that a plaintiff would have a perfect right to make any of them defendants, or omit any of them; but it appears that the rule by which I was guided to that opinion is varied where there is joined with the breach of trust a claim for a general account. I want no better authority than this case cited to me of *Coppard v. Allen*. The principle is also observed upon in the standard book in equity on these matters (*Calvert on Parties*)—that is, that unless the representatives of deceased trustees are parties the suit is abortive. If that is so—and it seems very natural—that being a principle of equity, and not a mere matter of practice variable at the will of any judge sitting in equity, I take it that the rules under the *Judicature Act* adopted here cannot by any means do away with the necessity of a suit being so constituted. The Act and Rules have simply prevented the Draconian method of stopping the case, making an end of the whole litigation and the loss of all the costs. These rules, therefore, simply provided that any party or the Court might add the proper parties. The rule does not mean that a defendant who objects that the suit is wrongly constituted is himself bound to put it right, though perhaps he may do so; nor is the suit to go on though wrongly constituted. I do not think that can be allowed to happen. The necessity of joining the missing party is not for the purpose of punishing the party who has not done what he ought to have done, but to do justice between all parties concerned. That view of the rule has been adopted in our own Court in *Williams v. Sandy*, and it and other cases show what is to be done. There is to be an adjournment to have the matter set right, and

the party to blame is to pay the costs. If the defendant knows of a deficiency of parties, and keeps it till the day of trial, then he must abide his own costs; but if, at the earliest moment, he takes an objection that the plaintiff has not made so-and-so a party who is a necessary party, he is entitled to get costs from the plaintiff if the plaintiff chooses to go on without amendment. I think I should take the same course here—that I should give to the plaintiffs the option of going on at their peril with the suit as framed, or to take an adjournment for the purpose of adding parties and giving them an opportunity of adding them, and in that case, if the plaintiffs choose to amend, the costs of the day must be paid by them.

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The *Attorney-General*—The option should be either to have the action dismissed with costs, or else take the adjournment with costs, because otherwise the defendants who are parties might be put to great expense when the Court will afterwards dismiss the action for want of parties.

Weigall—In *Embling v. Parry (i)* and *Crowley v. Sandhurst and Northern District Trustees Executors and Agency Company Limited (k)* the Court refused to go on.

MADDEN, C.J. I think I should take the same course as in the case of *Crowley v. Sandhurst, etc., Trustees Company*. I will give power to amend generally, and adjourn the action till the suit is properly framed by adding as parties and serving the personal representatives of the deceased Charles Stone, and I think I should follow the rule laid down by Mr. Justice Webb, that where notice is given by the defence, if the amendment is not made before trial, costs of the adjournment to amend must fall on the plaintiff neglecting to amend.

The plaintiffs subsequently added as defendants the two executors of the will of Charles Stone deceased—namely, Alfred Robert Stone and George Thomas—and served them. They also took advantage of the power to amend given to them by altering and adding to the charges of breach of trust made

(i) [1897] 23 V.L.R. 70.

(k) *Ibid.*, p. 661.

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against the defendant Harbison and Charles Stone. One of the breaches of trust alleged was as follows :—

“9 (i). They have expended over 9,000*l.* in repairs and additions to and in new buildings for the trust estate in Melbourne, and it is submitted that such was an excessive expenditure and not contemplated by the said will. Such repairs, etc., were to the extent of 5000*l.* or thereabouts, made out of money borrowed by them at interest, which interest has been paid by them out of the funds of the estate.”

The claim was added to by asking for an inquiry as to the profits made in his business by the defendant Harbison from the use of moneys of the estate, and an inquiry whether the amount expended by the trustees in repairs was proper or excessive, and an order that the defendant Harbison repay to the estate moneys paid by way of interest on moneys borrowed for such repairs, and also an order that the defendant Harbison repay to the trust estate, with interest, a sum of 1200*l.* misappropriated by an agent of the trustees.

The action now again came on for hearing before Hood, J.

Goldsmith and Bryant for the plaintiff.

Isaac A. Isaacs (A.G.) and *Weigall* for the defendant Harbison.

Agg for the other defendants, except Alfred Robert Stone and George Thomas, the executors of the will of Charles Stone deceased.

No appearance for the defendants A. R. Stone and G. Thomas.

The plaintiffs put in an affidavit of personal service of the amended writ, and produced from the Prothonotary's office a statement of claim filed on the 27th February 1899. Two complete copies of all the pleadings were filed at such office on the 10th March and were in Court, one having been handed to the Judge, the other produced from the office.

Weigall objected that there was no affidavit that any state-

ment of claim had been filed in accordance with Order XIII., r. 12, on the non-appearing defendants.

[HOOD, J. A statement of claim was filed, and from the date of the filing marked by the Prothonotary—namely, 27th February 1899—it must have been with the object of complying with that rule. The complete copies of the pleadings were not filed until the 10th March. I can give them an opportunity of making an affidavit that it was filed against those defendants, if that is necessary.]

It has been held to be necessary. The practice upon the point has been quite settled by the cases of *Embling v. Parry* (l) and *Crowley v. Sandhurst and Northern District Trustees Executors and Agency Company Limited* (m). The object of the statement of claim being filed is to give defendants not appearing an opportunity of seeing what is alleged therein and a time (10 days) again to decide whether they will still appear. When that 10 days has expired without an appearance by those defendants notice of motion must be given to them under Order XXVII., r. 11, by leaving it at the Prothonotary's office, and an affidavit of the due service of that notice of motion made: Order XXVII., r. 11. As Harbison would be entitled to contribution from them he has a right to see that they are properly bound.

Agg adopted the objection and arguments of *Weigall*—According to the practice settled by the cases there must be filed under Order XIII., r. 12, in equity cases a separate statement of claim against each defendant who has not appeared. Here there is only one statement of claim filed against two defendants. Nobody can say against which of those two it is filed. Further, the action has never been set down on motion for judgment against those defendants under Order XXVII., and the Court is not therefore in a position to give judgment against them. My clients would be entitled to judgment against both trustees, and they are therefore entitled to ask that that should be done.

Goldsmith and Bryant for the plaintiffs, *contra*—The plaintiffs

(l) [1897] 23 V.L.R. 70.

(m) *Ibid.* 661.

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ask nothing against Stone's estate, and do not desire a judgment against his executors. If any of the defendants desire it they can, under the Rules, put themselves in a position to obtain it, but have not done so. Stone's executors are not necessary parties to the action, and have only been added at the defendant Harbison's suggestion.

[HOOD, J. The Chief Justice has decided that they are necessary parties, and you have acceded to his judgment by not appealing therefrom and by adding them.]

It does not follow from his judgment that the plaintiffs are bound to ask for judgment against them. The only matter decided by Madden, C.J., was that Stone's estate was a necessary party. His estate has been added by adding his two executors. They are in law one person, and it is submitted that the filing of one statement of claim against them is sufficient. That it is the estate which is represented is shown by Order XVI, r. 46. Where there is default in entering an appearance, it is submitted that it is not necessary to set down the action on motion for judgment.

[HOOD, J. The action is to proceed as if such person had appeared, *i.e.*, under Order XXVII, r. 11.]

That applies where there is only one defendant.

Weigall in reply—Order XVI, r. 46, relates to an administrator *ad litem* where there is no representative of a deceased person. Here there are two representatives, and one only has been served with the statement of claim by its being filed in the Prothonotary's office.

HOOD, J. The inclination of my mind is to overrule objections of this class taken at the trial, not because the objections are bad, but because I think they should be more properly dealt with in Chambers before the trial comes on. That course, however, is not now open to me. I think I am bound by the decisions which say that such objections can be taken in Court. To adopt my view I know that the Rules would have to be altered, but it is a matter which deserves attention. It is a useless expense for parties to come here ready for trial and have

the case stopped in this way. Turning to the objections, I think two of them are good. The two defendants, Stone and Thomas, were necessary parties—that has been disputed, but it has been decided by the Chief Justice, and there has been no appeal from his decision. The plaintiffs, acting on the decision, have added them as defendants, but having added them have not properly complied with the Rules. The decisions on the Rules show that they must first serve the defendants. On their failing to appear the plaintiffs must file in the Prothonotary's office a statement of claim for, I think, each defendant who does not appear, and then an affidavit ought to be made stating that the filing of the statements of claim was for the purpose of effecting service on those defendants not appearing. So far as no affidavit of service of the statement of claim by filing it is concerned I can cure that in a moment. There is no doubt from the date of filing that it was filed for that purpose, and I could give leave now to file such an affidavit. But it has been pointed out that only one statement of claim is filed and there are two non-appearing defendants, and each person who is called an executor is entitled to have one filed, and to come forward and dispute that he is executor.

The third objection is, I think, equally strong. If there were only one defendant Order XXVII., r. 11, would clearly apply, and it is impossible to give a different meaning to the Rules when there is one defendant only to what would be given where there are more. If the plaintiffs would have to proceed under Order XXVII., r. 11, where there is only one defendant, they have to do the same where more than one defendant is sued and one is not appearing. There is substance behind the objection, for I think again Mr. Weigall is right when he points out that the defendant Harbison is entitled to have a decree, if it is to go against him, against Stone's estate also, so that he may have contribution against that estate. It is said that there is no claim against Stone's estate, but I find, on looking at the statement of claim, that there is an allegation that both trustees expended excessive moneys in repairs, which they borrowed for the purpose at interest, and an inquiry is asked whether the amount so expended by them was a proper or an excessive expenditure. It is true that the claim

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afterwards asks that the defendant Harbison be ordered to repay the interest paid on the borrowed money, but it leaves Stone's estate liable for the excessive expenditure of principal. The plaintiffs' advisers have sinned against light. There were at least two decisions to guide them, and I think the plaintiffs must pay the costs of and occasioned by the adjournment. Adjourn to next sittings, plaintiffs to pay the costs of and occasioned by the adjournment.

Solicitor for plaintiffs : *S. M. Watson.*

Solicitors for defendant Harbison : *Gillott, Bates & Moir.*

Solicitors for other defendants, except Stone and Thomas :
Bullen & Carter.

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IN RE MORISSEY, EX PARTE PERKINS.

Insolvency—Petition to sequester—Improper motive—Abuse of process of Court.

Where an act is legal and the intention with which that act is done is to accomplish an object also legal, it is immaterial what the ulterior motive of the party may be.

P., who had a personal grudge against M., bought a debt owing by M. to a third person with the view of making M. insolvent and thereby depriving M., who was a municipal councillor, of his seat as councillor. After the purchase of the debt, demand for payment having been made and not complied with, P. took proceedings to sequester the estate of M. Upon the return of the order *nisi* it was objected that the proceedings were an abuse of the process of the Court :

Held, that P. was entitled to take such proceedings, and that they were not an abuse of the process of the Court.

THIS was an order *nisi* upon the petition of one Perkins to sequester the estate of one Morissey. The following objections (in addition to others not material to this report) were filed :—

(1). That the petition herein was presented and the order *nisi* obtained, not for the legitimate purpose of getting the petitioning creditor's debt paid, nor for the purpose of distributing the estate and effects of the respondent amongst his creditors, but for the indirect purpose of ousting the respondent from his position as a councillor of the shire of Mansfield. (2). That the proceedings herein are wholly outside the legitimate purpose of insolvency, as based on proceedings altogether illegal, vexatious, inequitable, and oppressive. (3). That the petition was presented

and the order *nisi* obtained for a purpose foreign to the legitimate object of the insolvency laws. (4). That the order *nisi* was obtained in fraud and abuse of the insolvency laws.

The following facts were adduced at the hearing before Holroyd, J.:—In 1894 one Smith obtained judgment against Morissey for a debt of £88. Smith, who was called, said that nothing was done under that judgment, as he knew Morissey had nothing. Morissey was a member of the municipal council of Mansfield. Perkins, the petitioning creditor, had been a councillor, and had a grudge against Morissey on account of offensive expressions used by the latter with regard to him. In August 1898 Perkins contested the seat for the council, and was defeated. Morissey, it was said, was an active supporter of his opponent. In July 1898 Perkins wrote to Smith's solicitor offering to buy the judgment debt against Morissey for £5, so that, as he said, he might make him insolvent and deprive him of his seat as councillor. Evidence was given of conversations between Perkins and other persons which tended to show a strong feeling of spite on the part of Perkins against Morissey. Perkins bought the judgment debt for £5, and then commenced proceedings to sequester Morissey's estate. Certain questions as to evidence were raised at the hearing, but were not dealt with at the time of the decision upon the main point argued.

Woolf for the respondent—The petitioning creditor is not making use of these proceedings for any purpose contemplated by the Act. He does not want to distribute the assets or deal with the estate under the Act. His sole object is to vent his spite upon the respondent, and, by making him insolvent, oust him from his position as councillor. The Court will not, under such circumstances, allow the process of the Court to be so abused: *In re Smart & Walker* (a); *Ex parte Griffin* (b); *Ex parte Harper* (c).

T. P. McInerney for the petitioning creditor—The Court will not inquire into the motive of a person who is doing a

(a) [1894] 20 V.L.R. 97.

(b) [1879] 12 Ch. D. 480.

(c) [1882] 20 Ch. D. 685.

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lawful act: *King v. Henderson* (d). The cases are all reviewed in that decision. *In re Leonard* (e).

Cur. adv. vult.

HOLROYD, J. (His Honor dealt first with an application for a postponement of the hearing made by the petitioning creditor.) The parties were desirous that I should proceed to hear the evidence respecting certain additional objections filed on behalf of Morissey. There were four objections so added, but they in reality come down to one—viz., that the process of the Court is being abused for an improper purpose. Evidence was given before me to show that Perkins had a certain spite against Morissey on account of offensive expressions used by Morissey regarding him, and also on account of Morissey having aided the petitioning creditor's opponent in an election for the office of municipal councillor, and other circumstances were adduced to show that this spite was the motive which prompted him (Perkins) to purchase as he did a debt due by Morissey to another person, and upon that debt to endeavour to make Morissey insolvent, the consequence of Morissey's insolvency being that he would thereby be deprived of his seat as a councillor. I think that if the object of an act is legal, and there is no wrongful intention in it, but the intention is to do something also legal, founded upon that act—it is perfectly immaterial what the ulterior motive of the party may be—what it may be that prompts him to do the legal act. In this case I dare say the petitioning creditor was prompted to endeavour to get Morissey out of his position as municipal councillor in part at any rate by the unworthy motive of revenge or of gratifying some ill-feeling which he had towards him; but what he did was as legal as could be; there was no fraud whatever. No one was ousted of any right by what he did, and there was no intention to defeat or defraud any creditor. It is perfectly legal to buy a debt with the object of founding sequestration proceedings upon it. The debt was purchased, a demand for payment was made. If it had been paid no proceedings could have been taken.

(d) [1898] A.C. 720.

(e) [1896] 1 Q.B. 473.

There is no fraudulent intention in trying to make a man insolvent by the purchase of a debt, or by the purchase of a debt with the view of making him insolvent. The debtor does not pay. There is nothing wrongful in making him insolvent for the purpose of depriving him of his seat as a municipal councillor. If a man cannot or will not pay his debts anyone has a right to try and get him out of such an office ; anybody and everybody may do it, and perhaps it is just as well that it is so. The motive, then, I think, is of no importance at all, and therefore I hold that these four objections have not been sustained. (His Honor then dealt with the terms upon which he would allow the petitioning creditor to call further evidence to prove the act of insolvency.)

Solicitors for petitioning creditor : *McInerney & McInerney*.

Solicitors for respondent : *Gunnson & Lonie*.

W. H. M.

[PRACTICE COURT.]

DEARY v. MOORE.

Marine Act 1890 (No. 1165), s. 151—Excessive number of passengers on steamship—Liability of master of ship.

A defendant was charged under sec. 151 of the *Marine Act 1890* for that he being the master in charge of the steamship *Courier* did receive on board of the said steamship a certain number of passengers greater than the number allowed by the certificate issued in respect of such steamship. The defendant was registered as master of the steamship and was in charge of the steamship for the purpose of navigating the same on the occasion mentioned in the charge. The defendant had no power or authority from the owner to receive passengers, that being the duty of the marine superintendent of the owners of the vessel, who was on board at the time complained of. The defendant swore that he did not know that more than the proper number of passengers was on board, and on being directed by the marine superintendent he gave directions for the steamship to leave the moorings.

Held, that it was the duty of the defendant to have ascertained that the number of persons on board did not exceed the number allowed by the certificate, and that he was liable to a penalty under sec. 151 of the *Marine Act 1890*.

THIS was an order *nisi* to review the decision of the Court of Petty Sessions at Melbourne. The informant Deary, who was an inspector of shipping, charged the defendant, Gilbert Moore, for that he, being the master in charge of the s.s. *Courier*,

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received on board thereof a certain number of passengers greater than the number of passengers allowed by the passenger certificate issued in respect of the said steamship. It was proved that the number of passengers on board did exceed the number allowed by the certificate. The defendant was the registered master of the s.s. *Courier*, and was on board at the time complained of. Captain Bull, the marine superintendent for the owners of the steamship, was also on board. Captain Bull was looking after the passengers. The tickets for passengers were issued at an office on the wharf. The defendant gave the orders from the bridge for the moorings to be cast off. Captain Bull, who was called for the defence, stated that he was on board on the occasion complained of, that he was in sole charge as to taking passengers on board, and that the defendant had no power or authority to receive passengers, that being his duty. The defendant stated that he had nothing to do with receiving passengers on board, and did not know that the number on board exceeded the number permitted by the certificate. The Court fined the defendant 10*l.*, with 2*s.* 6*d.* for each passenger carried in excess of the lawful number. The defendant then obtained an order to review this decision, on the grounds—(1.) That there was no evidence that the defendant was guilty of the offence charged. (2.) That the evidence conclusively showed that the defendant had not, as master of the s.s. *Courier* or otherwise, received on board a number of passengers greater than the number allowed by the certificate. (3.) That the evidence conclusively showed that the defendant was not, either as master or otherwise, in charge of the s.s. *Courier* for the purpose of receiving passengers.

The order *nisi* now came on for hearing before Holroyd, J.

Eagleson to show cause.

Counsel having read the affidavits was stopped by the Court.

Cussen to move the order absolute—The defendant was only in charge of the vessel for navigating purposes and did not

receive passengers on board or allow them to come on board as passengers. Under the first clause of sec. 151 of the *Marine Act* 1890 a penalty can be inflicted in those cases only where the master has been guilty of some positive act. It is the owner or the representative of the owner who is to be responsible for receiving the excessive number of passengers on board. The other portion of the section making the master responsible for the steamship having an excessive number of passengers on board might apply to this defendant, but he was not charged with that offence.

[HOLROYD, J. "Receive" means "to permit to come on board," and any person, whether owner or master or other person in charge, is liable under the first part of the section.]

There is a distinction drawn as to the cases in which the owner or master is responsible and the case in which an "agent" is responsible. There was another person on board who was the "master" for this purpose.

[HOLROYD, J. It was the duty of the defendant to find out whether there was an excessive number of passengers on board or not before he gave the order to start. He must not permit the excessive number to come on board.]

A person is not guilty unless he knew or ought to have known of the fact.

[HOLROYD, J. The Act makes him responsible whether he knew or not. He should have prevented them from coming on board. He should not have left the moorings until he found out. If he took the word of someone else for it he is responsible.]

The section clearly contemplates a distinction between the act of receiving passengers on board and the fact that the ship has sailed with an excessive number of passengers on board.

HOLROYD, J. For the reasons stated during argument I think this order should be discharged, with costs.

Order discharged with costs.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitor for defendant: *Croker*.

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[PRACTICE COURT.]

IN RE LOGAN.

*Licensing Act 1890 (No. 1111), s. 85—Annual sittings of Licensing Court—
Extension of time for holding sittings of Court.*

By section 85 of the *Licensing Act 1890* the Licensing Court for each licensing district is to hold an annual sitting in the month of December in every year, and it provides that "the Governor in Council may by an Order in Council extend the time for the holding of such Court by a period not exceeding two months from the thirty-first day of December."

Held, that the Governor in Council has only power to extend the time for holding the Court where such extension is made before the sitting of the Court is closed.

Where the Court has met and disposed of its pending business, the time for holding the Court cannot afterwards be extended.

THIS was a case stated by the Licensing Court for the licensing district of Chiltern for the opinion of the Supreme Court. The material facts stated in the case were as follows:—The applicant, Daisy Logan, on 17th January 1899, lodged with the clerk of the Licensing Court at Chiltern an application for a certificate authorizing the issue of a grocer's license. This application was brought before the Licensing Court on 25th January 1899. By proclamation of the Governor in Council dated 23rd December 1898 the time for holding the annual sitting of the Licensing Court for the licensing district of Chiltern was extended for a period of two months, and in accordance with such proclamation a sitting of such Court was held at Chiltern on the 25th January, at which this application was made. The annual sittings of the Licensing Court for that district had already been held at Chiltern on the 9th December 1898 and duly closed. At the hearing of the application the Licensing Inspector raised the objection that the Court had no jurisdiction to hear the application, as the Governor in Council had no power to extend the time for the sitting of the Court after the annual sitting of such Court had already been held and duly closed. The majority of the Court decided in favour of the objection, and held that there was no power to extend the annual sittings, inasmuch as the annual sittings had been already held and closed in the month of December 1898. The question for the opinion of the Court was:—Was the determin-

ation of the said Licensing Court (by the majority thereof) erroneous in point of law ?

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Gaunson for the applicant Logan.

Counsel referred to the following cases:—*The Queen v. Pownall* (a); *Drake's Case* (b).

W. Fink for the licensing inspector was not called upon.

HOOD, J. The Licensing Court for the licensing district of Chiltern held a meeting on the 9th December 1898, that meeting being the annual meeting of the court at the place appointed by the Governor in Council; that meeting was held and closed. On the 23rd December 1898 the Governor in Council purported, under sec. 85 of the *Licensing Act* 1890, to extend the time for holding that court for two months from the 31st December. In January 1899 the court sat again, and this application was heard. The majority of the court decided that the Governor in Council had no authority to extend the time in the manner in which it was done. In my opinion that decision was right. The meaning of the Act is reasonably clear. The licensing business is to be disposed of, if possible, in December; the section says that the Licensing Court shall in the month of December hold an annual sitting. It is however contemplated that, for some reason, it may not be possible to hold the court and finish the business of that court in the month of December. So the section goes on to provide for cases in which it is inconvenient or impossible to hold the meeting in the way provided, and in that case the Governor in Council may extend the time for holding the sittings from December to two months longer. That power must be exercised under the circumstances under which it is contemplated that the necessity for its exercise may arise. It was never intended that where a court *has been* held and *has disposed* of the business, the Governor in Council can direct another annual court to be held beyond the time fixed by the Act. In my opinion the Governor in Council has only power to

(a) [1893] 2 Q.B. 158.

(b) [1869] L.R. 5 Q.B. 33.

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LOGAN.Hood, J.

extend the time for holding the court before the court is closed. It is a contradiction in terms to say that you may extend the time for doing a thing when the time for doing that thing has expired. I answer the question in the negative, and decide that the decision of the court was right. The applicant must pay the costs.

Solicitors for applicant: *Gaunson & Lonie.*

Solicitor for respondent: *Guinness, Crown Solicitor.*

W. H. M.

1899

April 18.

Holroyd, J.

[PRACTICE COURT.]

IN RE McCracken's Brewery Co. Limited.

Companies Act Amendment Act 1892 (No. 1269), s. 4—Meeting of creditors—Power of Court to vary the order calling meeting.

Quære, per HOLROYD, J. Whether the Court has power to alter an order made by the Court directing a meeting of creditors to be held under the provisions of sec. 4 of Act No. 1269.

AN order of the Court had been obtained on behalf of the McCracken's Brewery Co. Limited directing a meeting of creditors to be held to consider a scheme of compromise or arrangement under the provisions of sec. 4 of Act No. 1269. By this order certain directions were given as to the mode in which debenture-holders were to prove their right to appear at the meeting as such debenture-holders. After the order had been obtained it was alleged on behalf of the debenture-holders that a more simple method might be adopted, and it was suggested that the order might be varied in this respect. The matter was mentioned to the Court on behalf of the company, no one appearing for any of the creditors.

Higgins for the company—The company would be willing to meet the views of the creditors in perfecting the method and manner of holding the meeting, but a doubt has arisen whether the Court, having once made an order under sec. 4 of Act No. 1269, has any power to amend or vary such order.

HOLROYD, J. I can see no power given by the section which would justify the Court in altering an order once made. An order has already been made directing the meeting to be held in a certain manner, and I am afraid I have no power now to say that that meeting shall not be so held. I cannot stop the first meeting. I am very doubtful about my power, to say the least of it, and I think the company would run a risk in adopting the proposed alteration. I am inclined to think that I have no power to alter the order originally made.

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Higgins stated that the company would not take the risk, and the suggestion as to the amendment of the order was withdrawn.

Solicitors for company: *Crisp, Lewis & Hedderwick.*

W. H. M.

[PRACTICE COURT].

ELLIS v. WING LEE.

1899

April 26.

Holroyd, J.

Factories and Shops Act 1890 (No. 1091), s. 61—Proceedings against offenders to be directed by Minister—Amendment of Minister's authority—Order nisi to review.

A court of petty sessions upon proceedings for an offence under the *Factories and Shops Acts* has no power to amend the direction of the Minister given under sec. 61 of Act No. 1091 to take such proceedings.

ORDER *nisi* to review the decision of the Court of Petty Sessions at Melbourne. The information was laid by Ellis, an Inspector of Factories, charging the defendant Wing Lee for that he being the occupier of a factory permitted a person whose name was unknown to the informant to work during prohibited hours. The informant produced his authority to prosecute under sec. 61 of the *Factories and Shops Act* 1890, which was an authority signed by the Chief Secretary directing "proceedings to be taken against Wing Lee, laundryman, for permitting a person whose name is unknown to 'work'" during prohibited hours. At the hearing it appeared that Wing

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Lee was himself the person who was seen working, but, on account of the deceptive statement made by Wing Lee, the constable who gave evidence concluded that the person he saw was a workman only, and that Wing Lee was the principal employing such person. On seeing the defendant in Court, however, the constable identified the defendant as the person working, and it was admitted that this was Wing Lee himself. Application was then made to amend the information so as to charge the defendant with working himself, instead of permitting a person to work, during prohibited hours. The solicitor appearing for the defendant stated that he would not consent to the amendment, but would not object to its being made. The amendment was accordingly made. The case for the prosecution being closed, the objection was taken that the authority of the Chief Secretary did not warrant these proceedings against the defendant on this charge. The Police Magistrate then said—"As you consented to the amendment of the information I take it that you consented to the amendment of the authority put in." The defendant was fined ten shillings. An order *nisi* to review this conviction was granted on the ground that there was no evidence that the Minister directed proceedings to be taken against or authorized the prosecution of the defendant in respect of the offence charged for which he was convicted.

W. Fink to show cause—The direction given by the Minister is to take proceedings for an offence against the provisions of the *Factories and Shops Act*. There is no necessity that such authority should be in writing—a verbal direction is sufficient, and unless a manifest injustice is being done it can be varied or taken by the Court as a direction that the actual offence shall be punished. The authority in this case specifies distinctly the offence or the occurrence complained of. The difficulty arose through the trick of the defendant; he was well aware of the charge and of the nature and circumstance of the offence.

Meagher to move the rule absolute was not called upon.

HOLROYD, J. In my opinion this conviction is bad. The magistrate had no power to alter the direction of the Minister,

which is in writing, or to strike out any part of it. The solicitor appearing for the defendant consented to the charge being altered from "permitting a person to work" to a charge "for working." The defendant was convicted of working. There was no permission from the Minister to direct proceedings against Wing Lee for working. The direction is to take proceedings for permitting a person to work within prohibited hours. The order will be made absolute, without costs.

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Holroyd, J.

Order absolute.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitor for defendant: *Jameson*.

W. H. M.

TAYLOR v. RIGBY.

Health Act 1890 (No. 1098), s. 35—By-law—Registration—"Purveyor of milk"—Place of registration.

F.C.
 1899
 April 24.

An information was laid against defendant for carrying on the trade of a milk purveyor within the jurisdiction of the local council of Port Melbourne without having registered himself there under the provisions of a by-law requiring every purveyor of milk to register himself as to "every place within the jurisdiction of the local council at which such trade or any part of it is to be carried on."

The defendant had no place of business nor depôt in Port Melbourne, but was registered in respect of a place within the jurisdiction of another local council. The defendant drove a milk cart through Port Melbourne and sold and delivered milk to his customers there.

Held that, although the defendant had no depôt nor place of business in Port Melbourne, he had not committed a breach of this by-law, that he need not register himself under it, and that he could not be fined for carrying on the trade of a purveyor of milk within the jurisdiction of the Port Melbourne council.

Ryan v. Beadle (23 V.L.R. 164) disagreed with.

ORDER TO REVIEW.

The plaintiff was sanitary inspector to the municipality of Port Melbourne, and the defendant was a purveyor of milk, registered as such in the municipality of South Melbourne. On the 3rd day of February 1899 the defendant was proceeded against at the Port Melbourne Court of Petty Sessions on an information charging him with carrying on the trade of a

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purveyor of milk without having registered himself with the council of Port Melbourne, contrary to the by-law in such case made and provided. The by-law was made under sec. 35 of the *Health Act* 1890, which gives the council power to make by-laws for "the registration annually with the council of all persons carrying on the trade of cow-keepers dairymen or purveyors of milk." The by-law was as far as material in these terms:—

"Every person carrying on the trade of a cowkeeper dairyman or purveyor of milk shall . . . register himself with the council in the manner following that is to say by signing an application in the form hereunder set out:—

SCHEDULE.

Name in full	...	...	...	...	...
Trade in respect of which registration is desired	...				
Every place within the jurisdiction of the local council at which such trade or any part of it is to be carried on	...	...	...	...	...

It appeared from the evidence that the defendant was registered at South Melbourne, and not in Port Melbourne; but he drove a cart with his name on it through Port Melbourne, and had several customers there, to whom he sold milk daily in small quantities. The bench considered they were bound by a former decision, and dismissed the case with 2*l.* 2*s.* costs. The plaintiff obtained an order to review upon the ground "that on the evidence the defendant ought to have been convicted."

The order to review came on for hearing before His Honor Hood, J., who, in view of the decision in *Ryan v. Beadle* (a), referred the matter to the Full Court.

Bryant for defendant to show cause—The by-law is aimed at the "place" and not at the person. It applies only to persons trading in such municipality. It is submitted the Court should not agree with the decision in *Ryan v. Beadle*. *White v. Harmer* (b) is in my favour.

Cussen for informant to move the rule absolute—In *White*

(a) [1897] 23 V.L.R. 164.

(b) [1898] 24 V.L.R. 513.

v. *Harmer* it is specially pointed out that the Court are not dealing with the decision in *Ryan v. Beadle*. The object of the by-law is to secure the registration of the person who purveys the milk, not the registration of his place of business. It is true that the defendant had no depôt nor place of business in Port Melbourne, but he should still have filled in the schedule by saying "no place within jurisdiction of the council." As to filling in schedule see *Danby v. Australian Financial, etc., Co. (c)*.

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WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] This is an order *nisi* to review the decision of justices referred by Hood, J., to this Court. One, or, rather, the principal ground on which it has been referred is that in the case of *Ryan v. Beadle (d)* the accuracy of the decision of Madden, C.J., has been called in question, and has to be considered. It appears that an information was laid by the complainant against the defendant for a breach of a by-law made by the municipality of Port Melbourne. That breach substantially comes to this—that the defendant was charged with carrying on the trade of a purveyor of milk within the jurisdiction of the council of the town of Port Melbourne without being registered under by-law 69 made by the council. The justices dismissed the information, and the informant then obtained an order to review, on the ground that upon the evidence the defendant should have been convicted.

The question to be determined turns upon sec. 35 of the *Health Act* 1890, and the construction to be given to this by-law No. 69. The Act gives power to local councils to make, among other things, by-laws for "the registration annually with the council of all persons carrying on the trade of cowkeepers dairymen or purveyors of milk." Now, on the evidence there is very little doubt but that the defendant was a purveyor of milk within the town of Port Melbourne. According to the evidence, which is uncontradicted, he was in the habit of supplying and selling milk to various customers in Port Melbourne, but he had no

(c) [1892] 18 V.L.R. 303.

(d) 23 V.L.R. 164.

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place within the jurisdiction of the local council at which he carried on his trade, he had no store nor dépôt. He merely went round in the ordinary way: he had a dairy in another jurisdiction, he brought the milk from it to Port Melbourne and disposed of it to his customers there. That portion of the *Health Act* which I have read would include a purveyor of milk of this description, because it refers to "all persons carrying on the trade . . . of purveyors of milk" within, of course, the council's jurisdiction. Now, the defendant was on the evidence clearly carrying on the trade of a purveyor of milk within the jurisdiction of this council. Then the question arises whether this by-law hits this particular class of person, namely, purveyors who purvey milk within the jurisdiction of the council and yet have no place within the jurisdiction where their trade or business is carried on. If this by-law does not hit that class of persons, then this defendant is not hit by it, and the decision of the justices is right. Therefore it comes to this, what is the proper interpretation of this by-law? I say, for myself, that it is not an easy question to decide, and I have had some difficulty in coming to a conclusion upon it, possibly more than has been felt by my two colleagues. But I am inclined to think that Mr. Bryant's interpretation of this by-law (clause 4) is the right one. We must endeavour to find out what the by-law means and aims at, not by speculating as to the intention of its framers, but by the aim of the by-law as it appears in itself. That seems to me a safe rule of construction. If we read clause 4 of the by-law as a whole it appears to me that it only includes or is aimed at a certain class of persons who are purveyors of milk. It begins, it is true, with the words "Every person carrying on the trade of dairyman cowkeeper or purveyor of milk" (within the jurisdiction of the council) "shall register himself with the council in the manner following." That manner following is set out in the schedule to the clause. (His Honor read the schedule.) Therefore the by-law requires that every such person shall register "every place within the jurisdiction of the local council at which such trade or any part of it is to be carried on." That is, that every person who trades

as a purveyor of milk shall register himself in respect of every place within the jurisdiction of the local council. It therefore seems from the internal evidence of this by-law that the council in framing this by-law were only aiming to hit a certain class of purveyors—that is, that class of persons who had a place or places—for they might have two or three—where they carried on their business within the jurisdiction of the council. If such a person had two or three depôts he would need to register himself in respect of each of them. If that be the correct interpretation of the by-law—and we think it is—then this defendant does not come within the class aimed at by it, and therefore this information was rightly dismissed.

The case of *Ryan v. Beadle* is an authority the other way. All we can say with respect to that decision is that we do not agree with it. The learned Chief Justice in that case appears to have held that the form in the schedule might be complied with by stating that the registration was to be at “every place within the jurisdiction.” But such a compliance as that would make registration under the by-law practically useless.

It is not necessary to give a judicial decision on the point, but, as far as we can see at present, there would be no difficulty in the council’s framing a by-law which would include that class of persons of whom the defendant is a representative.

The order to review will be discharged with costs.

Solicitors for plaintiff: *Emerson & Pearcey*.

Solicitors for defendant: *Westley & Dale*.

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BEVAN v. MOORE (No. 2).

Order to review—"Important question or principle of law"—*Action by known agent*—*Justices Acts 1890 (No. 1105), s. 141; 1898 (No. 1584), s. 2.*

Where justices in petty sessions decide that a complainant being a known agent may sue for a debt due to his principal such a decision is one which involves an important question or principle of law within the meaning of sec. 2 of the *Justices Act 1898*.

Decision of HOOD, J. (*ante*, p. 634) disapproved.

Smyth v. The Queen ([1898] A.C. 782) applied.

ORDER TO REVIEW.

On 18th January 1899 Hood, J., refused an application by a defendant for an order *nisi* to review the decision of justices in petty sessions at St. Kilda (*a*). From this refusal the defendant appealed. The appeal was heard 7th April 1899. The Court granted an order *nisi*. This order now became returnable. The additional facts are sufficiently stated in the judgment of the Court.

Field Barrett to move the order absolute.

The complainant in person to show cause.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT and HODGES, JJ.] Originally in this case an application was made for an order *nisi* to review to Hood, J., sitting in the Practice Court. He refused the application. The complainant it appears was a cab-driver, and the cab he drove was employed by the defendant for election purposes at St. Kilda. It was agreed that he should be paid 1*l.* for the use of the cab on the day of the election. The defendant refused to pay him, and the complainant sued him in the court of petty sessions, and recovered the sum of 1*l.* Mr. Barrett, who appeared for the defendant, then applied to Hood, J., for an order *nisi* to review that decision on the ground that it involved or decided an important question of law. The amount being under 5*l.* the case came under the *Justices Act 1898* (No. 1584), sec. 2, which pro-

(a) *Ante*, p. 634.

hibits the review of an order of justices for an amount under 5*l.* unless it "involves or decides some important question or principle of law." The contention was that the affidavits of the defendant in support of the order *nisi* showed that the justices had decided that the complainant, being a known agent, could sue the defendant—in other words, that the principal need not sue. Hood, J., said that, although that was so, in his opinion that was not an important question of law within the section. In the report of the case (b) the learned judge says:—"It is contended that in this case an important question of law is involved, because the magistrates have virtually decided that an agent, known as such, can sue for a debt due to his principal. If that is the meaning of the section, as contended here, and that was the decision of the magistrates, the applicant would be entitled to an order to review; but I think that such a construction would be totally destructive of the section. Every point of law is of importance to the litigant to have the law properly decided, so that if the contention is correct that the section applies whenever any question of law is involved it would destroy the operation of the section, because it would apply to every case in which an order *nisi* could be granted. I think the intention of the Legislature was that in cases under 5*l.* a person must put up with a wrong decision, unless it appears that some important public matter of law is involved—some matter of general application—and it is not simply a case where the magistrates have erred against some well-known principle of law. If the magistrates settled an undecided question of law, then the applicant might come here; but if they made a mistake as to a well-known principle, the person aggrieved must put up with it." Now, we do not agree with that ground on which Hood, J., refused the order. It appears to us that that would be introducing words into the Act—something which the Act does not contain—and the Court must be careful that it does not *make* legislation. The decision of the Privy Council in the case of *Smyth v. The Queen* (c) cannot be disregarded on that point. Hood, J., says that the section means some "undecided question

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(b) 24 V.L.R. 634.

(c) [1898] A.C. 782.

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of law." We do not agree with that. That would really be introducing the word "novel" into the Act. If the magistrates did decide this case on the ground that an agent, known as such, could sue a defendant, we think that that would be a decision upon an important question or principle of law which would entitle the applicant to his order *nisi* to review. We think that that would be a decision on an important question of law within sec. 2. Therefore we do not agree with the ground upon which Hood, J., refused the order *nisi*. In this case the complainant appeared in person; he said he was too poor to obtain advice, and offered no argument, and did not even file an affidavit. Under these circumstances, as there was considerable doubt about the case, and even from the defendant's affidavit, as to what the grounds of the justices' decision were, we took the not unusual course of asking the magistrates to state for us the ground or grounds of their decision. We received the following reply from the chairman:—"The justices" (naming them) "desire me to state, for the information of the Full Court, that they decided in complainant's favour on the ground that the transaction was a cash one and the complainant was the principal." Therefore it is perfectly apparent now that they did not decide on the ground that an agent known as such and not the principal could sue for the debt. They decided that the transaction was a cash one; that the complainant made the bargain and was the principal. There is a good deal in the affidavit of the defendant which would tend to show that there are grounds on which the magistrates could come to that conclusion, but it is immaterial whether they could or could not, assuming that the facts do not justify the justices in arriving at that conclusion. Then the result is this—that they arrived at a wrong conclusion upon facts which are in evidence before them, and that certainly would have been a ground of granting an order to review in the face of the prohibition contained in this section. The complainant swore it was a cash transaction, and he swore whether he got the money or not he would have to account for it to Mrs. S., whose cab this was. He said that he would have to account to her whether he got it or not. The decision, therefore, is not without grounds. If this

is immaterial, and if they came to a wrong conclusion, that would not justify the review in face of this section.

The order will be discharged.

Order discharged.

Complainant in person.

Solicitor for the defendant: *Field Barrett.*

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THE QUEEN v. GIDNEY.

Land Tax Act 1890 (No. 1107), ss. 3, 4, 13, 14, 34—“Landed estate,” meaning of—Valuation—Classification—Government Gazette, evidence of valuation, effect of—“Sufficient evidence,” meaning of.

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May 1, 5, 8.

Hodges, J.

By sec. 34 of the *Land Tax Act 1890* it is provided that a copy of the *Government Gazette*, containing the valuation for Victoria, and of the *Land Tax Register* “shall be sufficient evidence for all purposes of such valuation and such register.”

Held, that the *Government Gazette* is not *conclusive* evidence of such valuation.

The defendant was the owner of land in different parcels of sufficient area to constitute a “landed estate” under the *Land Tax Act 1890*; those parcels of land had been valued as parts of different landed estates, but they had never been valued as *one landed estate* in the possession of the defendant or anyone else.

Held, that until such parcels of land had been valued as *one landed estate*, the defendant was not liable for the land tax in respect of the same.

THIS was an information on behalf of Her Majesty the Queen against Henry John Gidney. The information stated that the defendant was indebted to Her Majesty as the owner of a landed estate, consisting of 949 acres, in respect of land tax due under the Act No. 1107, for the two half-years commencing respectively 28th February 1897 and 28th August 1897, and which by the said Act are payable upon the 1st June 1897 and 1st December 1897 respectively; that on the 1st June 1897 and 1st December 1897 respectively the name of the defendant appeared upon the *Land Tax Register* within the meaning of the said Act as the owner of the said estate, and on or before the 7th June 1897 and the 7th December 1897 respectively the registrar within the meaning of the said Act did, from the said register and valuation for Victoria within the meaning of the said Act, make out, as provided by sec. 43 of the said Act, an

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account of the sums becoming payable by way of land tax by the defendant as appearing by such register and valuation, and did enter such sums against the name of the defendant in such register. Within seven days after the 7th June and 7th December respectively the said registrar, as provided by sec. 34 of the said Act, caused to be published in the *Government Gazette* a copy of the said valuation for Victoria, and of the said Land Tax Register, and by the said valuation and register so published the defendant appeared as the owner of the said landed estate, and as liable in respect of the said land tax. The amount claimed was 12*l.* 8*s.*

The defence admitted that the defendant was the owner of two pieces of land amounting together to 949 acres, but denied that at any time material to the action such lands or any part of them were or was landed estate, or that any land tax under the Act No. 1107 was due in respect thereof. It was also stated that the alleged landed estate was never valued or classified for the purposes of the Act until August 1898, when it was returned as of a value exempting it from tax, and the defendant never therefore had any opportunity of appealing from a classification, and the defendant contends that in these circumstances the said alleged landed estate never in fact became a landed estate or liable to tax under the said Act, and that valuation and classification are a condition precedent to liability to taxation under the Act. The defendant further objected that mere publication in the Land Tax Register or the *Government Gazette* of particulars concerning an alleged landed estate, which has not been properly valued or classified as a landed estate under the Act, does not impose liability on the alleged owner of such alleged landed estate.

The action came on for trial before Hodges, J., without a jury. It appeared from the admitted facts that the defendant was the owner of 949 acres, which consisted of two parcels of land, being separate areas not more than five miles apart, one of which consisted of 645 acres and the other of 304 acres. These two parcels originally formed portions of two separate landed estates. The landed estate of which the parcel of 645 acres originally formed portion was an estate of 818 acres

belonging to one Morton, and this estate of 818 acres was classified as first class in 1878. The defendant purchased 645 acres of this land from the transferees of Morton. In 1895 the defendant was placed upon the register in respect of these 645 acres without any fresh valuation or classification and taxed. The defendant paid 10s. for the half-year up to February 1897, and then refused to pay any more. The 304 acres was portion of an estate belonging to the Freehold, etc., Co., and in 1890 was classified and registered as second class land. In May 1897 the Freehold, etc., Co. transferred 304 acres, portion of its estate, to the defendant, and in June 1897 the Land Tax Register and Valuation were amended. The defendant then appeared upon the register as the owner of 949 acres, 645 acres of which is first class land and 304 of which is second class land, and upon this basis land tax of 12*l.* 8*s.* per annum was claimed as due as from the half-year commencing 28th February 1897. Shortly stated, it was admitted that the defendant was first placed upon the Land Tax Register as owner of estate No. 843A in 1895, he having become the registered proprietor of 645 acres, part of an estate of 818 acres, which had been classified in 1878 as a first class estate; then, in 1897, the defendant became the registered proprietor of the further 304 acres, being part of the second class estate formerly owned by the Freehold, etc., Co., and the registrar directed the register to be amended and the defendant's estate to be entered as one of 949 acres; the estate then stood in the register as a first class estate, but a note was made in the register that 304 acres had been classified in 1890 as second class land.

Upon application to the defendant for the tax upon this double basis he refused to pay, and in September 1897 he applied to have this estate reclassified. In August 1898 it was returned as a fourth class estate, and not subject to the tax at all.

Mitchell for the Crown—The *Government Gazette* is conclusive evidence as to the valuation. Sec. 34 of the *Land Tax Act* 1890 says that it is to be “sufficient evidence for all

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purposes of valuation," and that must be read to mean that it is conclusive; it would not be "sufficient for all purposes" if the defendant is allowed to go behind it.

Cussen for the defendant—The *Gazette* is not conclusive, and some meaning other than "conclusive" must be given to the word "sufficient." Secs. 35, 41, 43, and 44 point to the fact that the *Gazette* is not conclusive; there are provisions there which enable steps to be taken quite inconsistent with the conclusiveness of the *Gazette*. By sec. 3 (a) "landed estate" is defined, and clearly points to one property held and valued as a whole property. A portion of a second class estate and a portion of a first class estate bought out of respective second and first class "landed estates" cannot be placed upon the register without a fresh valuation. The "landed estate" is to be one particular class.

Counsel referred to the following cases:—*The Queen v. McMillan* (b); *The Queen v. Buckley Swamp Estate Company Limited* (c).

Mitchell in reply—The land held by the defendant has been valued. If he felt aggrieved he could have applied to have his name removed. The whole purpose of the Act would be defeated if an owner could, by selling a few acres of his original "landed estate," and by buying a few acres of land of a different class, successfully contend that he was no longer liable to pay the tax. The land being valued, and the owner placed upon the register, the tax is payable.

Counsel contended that, as to the sum of 11., judgment should be entered for that amount.

Cur. adv. vult.

HODGES, J. In this case proceedings have been instituted by the Crown for the purpose of recovering from the defendant the

(a) "Sec. 3. For the purposes of this Act at upwards of two thousand this Act a parcel or parcels of land five hundred pounds shall be called a of upwards of six hundred and forty 'landed estate.'" acres in extent forming one area or separate areas not more than five miles apart valued for the purposes of

(b) [1891] 17 V.L.R., p. 21.

(c) [1892] 18 V.L.R., 657.

sum of 12*l.* 8*s.*, which it is alleged the defendant owes to Her Majesty for land tax under the *Land Tax Act* 1890. On behalf of the Crown the *Government Gazette* was put in evidence, and from that *Gazette* it appeared that the defendant was the owner of a "landed estate," and that that "landed estate" was valued under the Act. It was contended by Mr. Mitchell that by sec. 34 of the Act this *Gazette* was conclusive evidence of the valuation, and that consequently the defendant was liable. Sec. 34 provides that a copy of the *Government Gazette* containing amongst other things this valuation "shall be sufficient evidence for all purposes of such valuation and such register." It is, no doubt, difficult to define what is meant by "sufficient evidence;" the words are not "*prima facie*," and they are not "conclusive," but something between the one and the other—viz., "sufficient." I find it very difficult to say how much more than "*prima facie*" is meant by the word "sufficient." It seems to me it would be wrong, however, to give that word the meaning of "conclusive," which is a word well known and commonly applied to documents which are meant by the Legislature or by the law to be conclusive; and further I think the Court ought to be slow in preventing a person from alleging and proving what is really true. I do not think the Court should give that meaning to a word of such doubtful import as "sufficient." I think therefore I am at liberty to go behind the *Government Gazette* and ascertain whether or not the defendant is liable to pay this land tax.

According to the facts the defendant is the owner of land in different parcels, which taken together are of sufficient area to constitute a "landed estate." Those various pieces of land of which he is the owner have also been valued as parts of different landed estates, but according to the undisputed evidence the lands of which he is the owner have never been valued as part of *one landed estate*. It is contended, on behalf of the Crown, that it is not necessary for them to be valued as part of one estate—that it is sufficient if *all* the lands in these different parcels have ever been valued as parcels of different estates. At the outset it is somewhat difficult to know how that would work if some of the lands had

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been classified as first class, some as second class, and some as third class. It is difficult to see how they could classify the whole without a revaluation. But, apart from that difficulty, the important matter is to ascertain the meaning of the Act. It was contended that a "landed estate" that had been valued might be broken up in respect of some very small area, so as to escape taxation. Difficulties might occur in that way, but I am not by any means clear that if the land of the estate is once properly valued, and the individual once properly put on the register in respect thereof, he is not liable from that time forward until he gets his name removed. That again is a matter not vital to the present question, though it might help the Court in ascertaining the meaning of the Act. By sec. 3 of the Act a "landed estate" is defined. (His Honor read the section.) According to that, what is required is land in one or more parcels, not more than five miles apart, comprising upwards of 640 acres, and valued at upwards of 2500*l*. Now, I take it that the essential conditions then to make a "landed estate" is that *that* "landed estate" should be valued—not that some person should be classified as to one portion and another as to another portion, but that *the estate*—the estate as one property—should be valued. The estate may be in five pieces, but it is one property, and it is that one property which has to be valued. Then sec. 4 provides as to the liability of the "owner of a landed estate." (His Honor read the section.) He must be the owner of the estate that has been valued; the estate must have been valued before he can be described as the owner of a landed estate. I think that view is borne out by the provisions of sec. 14. (His Honor read the section.) That is, the classifiers are to classify *the estate*. It is not sufficient to satisfy the section that portions of the estate have been classified as portions of other estates, but *the estate* is to be classified, and unless and until that estate is classified there is no liability for the land tax. I do not mean that after classification it may not be retrospective in effect, but unless and until it is classified the tax is not payable. Sec. 14 shows that the idea of the Legislature was not that the classifiers should go about the country classifying ten acres here and twenty

acres in another portion of the country, and so on, and then dealing with a landed estate on the basis that it is made up of areas of ten acres or twenty acres so valued, and so making up their valuation. The classifiers are to classify landed estates, and they do not do that unless they classify it as a whole. Judgment will be entered for the defendant, with costs.

Mitchell—Your Honor has not dealt with the claim as to 1l. The defendant was placed on the register in 1895 in respect of the 645 acres, which was portion of a first class estate, and he paid the tax for two half-years, and until he got himself removed from the register he is liable to be taxed as for this 645-acre block.

Cussen—The defendant is in the same position as to the 645 acres as he is to the whole estate. The 645-acre parcel was never classified as an estate, and may not be first class, as the portion of the original estate not conveyed to the defendant may have been the richest and most valuable land. However, this parcel has never been classified, and the defendant is not an owner of a "landed estate" until classification.

HODGES, J. I will consider this further point. I did not understand that counsel relied upon any distinction as to the two parcels, and at present I do not think there is any distinction.

Cur. adv. vult.

HODGES, J. It has been further contended on behalf of the Crown that the defendant was the owner or occupier of 645 acres. It was admitted that these 645 acres had been part of 818 acres, and that those 818 acres had been valued as an estate under the *Land Tax Act*, and it is said that inasmuch as those 818 acres had been valued as an estate under the Act these 645 acres, portion of that estate, were liable to the tax, or the owner was liable to pay the tax in respect of them. In my opinion that contention is not well founded. It is open to the observations I have already made. It by no means necessarily follows

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that because the 818 acres were valued as first class land the 645 acres would be so valued. The 173 acres which were no longer included in the 645 acres may contain all the water or the rich flats; the 645 acres may be hilly country, serviceable as an addition to the water or rich flats, but poor without the same. It by no means necessarily follows that these 645 acres would be first class land. Apart from that it has not yet been established that the defendant has ever rightly got upon the register as an owner of a "landed estate." Even if that be so, it is however said that he has paid land tax already in respect of these 645 acres. If there had been any dispute between the parties that might have been good and strong evidence that he was the owner of a "landed estate," but where there is no real dispute upon the facts that does not in itself create a conclusive or irrebuttable presumption that these 645 acres have been properly classified as first class land and the defendant properly placed on the register as owner of it, and as I am not bound so to infer in the face of facts which show that that is not so, I decline to do it. I therefore hold to the judgment already delivered.

Judgment for defendant, with costs.

Solicitor for the Crown: *Guinness*, Crown Solicitor.

Solicitors for the defendant: *Whiting & Aitken*.

W. H. M.

[PRACTICE COURT.]

IN RE McCracken's CITY BREWERY CO. LIMITED (No. 2), EXPARTE
QUINLIVAN.

1899
April 27.

Holroyd, J.

The Companies Act 1890, No. 1074, s. 36—Rectification of register—Discretion of Judge—Transfer to man of no means—County Court Act 1890 (No. 1078), s. 99—Sale of shares by bailiff—Right of purchaser to be registered.

By sec. 99 of the *County Court Act 1890* the bailiff may seize and sell shares of a company belonging to the judgment debtor, and "such bailiff or officer shall immediately or as soon after such sale as may be by a sale note transfer every such share to such purchaser and such sale note shall be a good valid and legal transfer of every share mentioned therein to all intents and purposes as if such transfer had been made by the holder of any such share to such purchaser and such purchaser shall become and be a shareholder in such company. . . ."

A shareholder in a company, desirous of avoiding an anticipated call in such company, made an arrangement under which he was sued in the County Court, judgment obtained against him in default of defence, and seizure made of the shares in the company held by him. In pursuance of such arrangement the shares were sold by the County Court bailiff and bought by a person acting in conjunction with the shareholder for a nominal sum. The purchaser was a man without means. The directors, under the powers contained in the articles of association, refused to register the purchaser as a shareholder.

Upon an application by the purchaser under sec. 36 of the *Companies Act 1890* to have the register rectified by placing his name thereon,

Held, that under the circumstances of the case the Court was not satisfied of the justice of the case, and the application should be refused.

THIS was a motion to rectify the register of McCracken's Brewery Co. Limited. The applicant Quinlivan was the purchaser of shares standing in the name of Fowler on the company's register. The shares were bought at a sale made by the officer of the County Court under the provisions of the *County Court Act 1890*. It was admitted that Fowler, who was a man with some means, anticipating that a call was likely to be made upon these shares, arranged with one Hayes that Hayes should sue him in the County Court, so that Fowler could avail himself of the provisions of sec. 99 of the *County Court Act* by the bailiff selling and transferring the shares to the purchaser, and so get rid of the liability upon these shares. Judgment was obtained accordingly in pursuance of this arrangement, no defence being put in. The shares were seized and sold by the bailiff, and the applicant Quinlivan, a brother-in-law of Fowler, and a man without means, bought the 1500 shares for the sum of 3*l.* 15*s.* Quinlivan then lodged the sale note with the company, and asked

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to have the shares transferred into his name. The directors, acting under the powers given by the articles, refused to register Quinlivan (a). Quinlivan then applied by motion to have his name registered in respect of these shares. Quinlivan filed an affidavit setting out the judgment, the purchase of shares, the sale note, and the application to be registered.

Leon in support of the motion—For the purpose of this argument it has been practically admitted that Fowler adopted this course so as to avoid any further responsibility in respect of the calls. The provisions of sec. 99 of the *County Court Act 1890* enable this to be done (b). So that this is a statutory provision under which the purchaser becomes and is a shareholder of the company, notwithstanding any provisions in the articles of association. It is a statutory registration, a statutory transmission of the shares. The article of association relied upon by the directors is not applicable to this case at all; it relates to a transfer made by a member of the company. This is not a transfer by a member at all. Then there is a marked distinction between a transfer by a member and a transmission by operation of law. The article governs the former but not the latter: *In re Bentham Mills Spinning Co.* (c). The directors have no power to refuse to register any person

(a) Article "33. The directors may decline to register any transfer of shares made by any person who is indebted to the company or to enter the name of the transferee in the register of members in respect thereof and may at their absolute discretion decline to register or allow any transfer of shares by any member without assigning any reason for such refusal and without incurring any liability in respect of such refusal."

(b) "Sec. 99. . . . And every bailiff . . . may also seize and take or levy and sell or dispose of any scrip or share or shares standing in the name of the person against whom such warrant shall have issued and the person or persons to whom the same shall or may be sold or disposed of shall

thenceforth become and be the legal possessor or possessors of such share or shares and all benefit accruing therefrom; and such bailiff or officer shall immediately or as soon after such sale as may be by a sale note transfer every such share to such purchaser and such sale note shall be a good valid and legal transfer of every share mentioned therein to all intents and purposes as if such transfer had been made by the holder of any such share to such purchaser; and such person shall become and be a shareholder in such company and entitled to all the rights and privileges and subject to all the liabilities thereof and the rules and regulations of the said company."

(c) [1879] 11 Ch. D. 900.

upon whom the shares have devolved by operation of sec. 99 of the *County Court Act* 1890.

Isaac A. Isaacs, A.G. (with him *Mitchell*) for the company to oppose—By sec. 36 of the *Companies Act* 1890 the granting of an application in this summary way is discretionary and the Court will not rectify the register unless “satisfied of the justice of the case.” In *Gunter’s Case* (*d*) the Full Court under circumstances similar to the present upheld the decision of *Williams, J.*, refusing to exercise his discretion in favour of the applicant. *Fowler*, as the original shareholder, should be a party to these proceedings, and full opportunity should be afforded of cross-examining all persons concerned in the transaction. This is merely a voluntary transfer, and *Fowler* cannot make use of the process of the Court to work out what is a fraud on the company. (Counsel proceeded to deal with the facts, and was stopped by the Court.)

Counsel referred to sec. 168 of Act No. 1482 as to transfers made to avoid liability.

HOLROYD, J. I think I ought not to decide this matter in a summary way on this application. Sec. 36 of the *Companies Act* 1890, under which this application is made, provides that the judge may either refuse the application or order rectification of the register if satisfied of the justice of the case. Now, on the facts of the case appearing on affidavit and upon the arguments addressed to me by counsel, I am not satisfied of the justice of this case. I should incline to the opinion that *Fowler*, the applicant *Quinlivan*, and *Hayes* had concerted together to take advantage of sec. 99 of the *County Court Act* 1890 for the purpose of enabling *Fowler* to get rid of an anticipated liability under the articles of association of the company to which he had subscribed—that is, had at law subscribed—and which liability he could not have avoided had it not been for this concerted scheme. Under the articles of association the directors of the company would have been perfectly justified in refusing to register the name of a purchaser from *Fowler* if such purchaser had been a man of straw, without any fraud at all on the part of the vendor or purchaser

(*d*) [1894] 20 V.L.R. 492.

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or third party concerting together to enable Fowler to defeat what would, but for that concert, have been impossible for him to defeat—a sensible provision in the articles to retain a paying shareholder and to reject a person who could not pay. Here I have before me no affidavit from Fowler or Hayes, two persons who would appear to be concerned in what—without using the word in a criminal sense—I may call a conspiracy. There is not the slightest doubt that a shareholder, anticipating calls, if there was nothing contrary in the articles, might before the recent legislation (which, I am told, would now prevent it), have sold his shares to a pauper. I have been referred to the new Act, under which, it is said, that is now prohibited; but whether that is the effect of the recent legislation or not I say nothing. I am assuming for the purpose of my judgment that a shareholder had that right, and that the old equitable rule remains in force. Even so, I feel the gravest doubt whether under such circumstances as these, and with articles of association prohibiting him from directly selling his shares to a pauper, or enabling the directors to disapprove of the person to whom they were sold, he would be allowed, by getting some other person equally guilty with himself to aid him to do that which is really a fraud on the company, to escape the consequences. I therefore say that if the applicant Quinlivan has any right at all he must be left to his action at law, and then there will be a possibility of examining Fowler and Hayes. There is no possibility of examining them now. In a case of this kind their evidence would be material. I refuse this application, but decide nothing upon the merits. I will give the applicant one month within which to institute an action, and if he chooses so to do I will make the costs of this motion costs in the cause; otherwise the motion will be dismissed, with costs.

Motion dismissed.

Solicitors for applicant : *Connelly, Crocker & Paling.*

Solicitors for company : *Crisp, Lewis & Hedderwick.*

W. H. M.

IN RE LANG, EX PARTE THE COLLECTOR OF IMPOSTS.

1899
March 24.
Hood, J.

Stamps Act 1890 (No. 1140), s. 96—Transfer on sale—Stamps Act 1892 (No. 1274), s. 25—Schedule (viii.)—Settlement or gift, deed of—Value of security, mode of calculating.

L. A. L. transferred certain freehold properties, leasehold properties, and mortgages to her daughter M. L., and the deed declared such lands and property were transferred in consideration that M. L. should expend and apply the sum of 50*l.* per annum during the rest of the natural life of L. A. L. in keeping and maintaining the said L. A. L. To secure the performance of this agreement the deeds were to remain in the custody and control of L. A. L. There was no evidence to show the age of L. A. L.

Held, that this was not a transfer of property on sale, that the deed was not an instrument upon a pecuniary consideration whereby property is given within Schedule (viii.) of Act No. 1274, and was therefore assessable for duty as a deed of settlement or gift.

In arriving at the value of a security the Collector of Imposts must take into consideration the actual value of the security to the person holding the same, and must not assess the duty upon the nominal or face value of the security.

SPECIAL CASE stated by the Collector of Imposts under the *Stamps Act 1890*.

The following facts were stated:—“(1.) Prior to the 7th September 1898 Mrs. Louisa A. Lang, of Regent-street, Elsternwick, widow (in this case referred to as the donor), was the registered proprietor under the *Transfer of Land Act 1890* of certain freehold and leasehold land and of certain mortgages. (2.) The freehold land is for the purposes of assessing duty under the *Stamps Acts* accepted as being of the value of 416*l.* 13*s.* 4*d.*, and the leasehold estate of the value of 333*l.* 6*s.* 8*d.*, while principal moneys due under the three mortgages are for the several sums of 200*l.*, 53*l.* 6*s.* 7*d.*, and 100*l.* (3.) On or about the 7th September the donor, in consideration of her daughter M. L. Lang (called the donee) agreeing to apply the sum of 50*l.* a year to the maintenance of the donor during the latter's life, arranged to transfer to the donee the donor's interest in the freehold and leasehold lands and the mortgages referred to. (4.) To carry out this arrangement the donor, on the 7th September, transferred her interest to the donee by instruments under the *Transfer of Land Act*,

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and at the same time executed the agreement, a copy of which, marked "A," forms part of this case. (5.) Each of the transfers is expressed to be made "in consideration of an agreement of even date," the agreement referred to being exhibit A, and the transfer of the freehold land bore adhesive duty stamps to the value of 2*l.* 15*s.*, and the transfer of the leasehold estate a duty stamp for 5*s.*, being duty for the transfer of the lease. (6.) The solicitors for the parties having, in accordance with the terms of the *Stamps Acts*, required the opinion of the Collector as to whether any of the instruments were chargeable with duty, and if so with what amount, the Collector was of opinion that the instruments evidenced a scheme whereby property was settled or agreed to be settled upon the donee or given or agreed to be given to her upon a consideration other than an adequate pecuniary consideration, and expressed the opinion that the transaction constituted a settlement or deed of gift within the meaning of the *Stamps Act* 1892, and assessed the duty payable at the sum of 8*l.* 5*s.* 6*d.*, which has been paid.

"Now I, James Davidson, the Collector of Imposts under the *Stamps Acts*, in compliance with a requisition in this behalf, do hereby state and sign this case, setting forth the questions upon which the opinion of the Collector was required and the assessment made, namely—

"(a) Whether any of the instruments referred to in this case were chargeable with any duty.

"(b) With what amount of duty was or were the same chargeable.

"J. DAVIDSON."

There was a supplementary statement which it is not necessary to set out. The agreement (marked A) referred to in the case contained the following clause, after setting out the transfer:—
"Now this agreement witnesseth and it is hereby declared that it has been agreed by and between the said M. L. Lang and the said L. A. Lang that the said M. L. Lang shall in consideration of the transfer to her by the said L. A. Lang of the said lands and mortgages expend and apply the sum of £50 per annum during the rest of the natural life of the said L. A. Lang in

keeping and maintaining the said L. A. Lang and that to secure the performance by the said M. L. Lang of the said agreement it has been further agreed that the deeds and documents relating to the title of the said lands and mortgages shall be held by and remain in the custody of the said L. A. Lang until her decease."

It was agreed between the parties during argument that to remedy certain omissions in the case as stated, an affidavit should be treated as part of the case. It appeared therefrom that a statutory declaration had been made by M. L. Lang as to the value of the properties; in this declaration it was set forth that the freehold land was worth 320*l.*, and the leasehold land at 332*l.*, less the rents payable to the Crown in respect of the leases, 182*l.* 12*s.*, making the value of the leasehold lands, 149*l.* 8*s.*; mortgage (a), 200*l.*; mortgage (b), 20*l.*; mortgage (c), being a second mortgage, *nil.* It was admitted that the Collector had not taken the rent payable to the Crown into consideration in assessing the value of the leasehold lands, and that he had taken the mortgages at their face value for the purpose of assessing duty.

Cussen for the appellant—The deed shows that the transaction was a sale, the purchaser practically providing an annuity for the vendor. It comes within sec. 96 (3) of the *Stamps Act* 1890. It is not a deed of gift, and there is no pretence for saying that it is not *bond fide* and that the consideration is not adequate.

[HOOD, J. How can I say it is adequate unless I know at least the age of the vendor or settlor?]

On the value of the properties transferred it is apparently adequate. The Collector should undoubtedly have made deductions in respect of the rents that have to be paid to the Crown for the leasehold, and should have considered the actual value of the mortgages, whereas he has taken the value of all the securities upon the basis of their face value. This assessment was decided to be wrong in *In re Twopenny* (a).

Counsel referred to the case of *Castlemaine Brewery Co. Ltd. v. Collector of Imposts* (b).

(a) *Ante*, p. 596.

(b) [1896] 22 V.L.R. 4.

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Weigall for the Collector of Imposts—The real issue is whether this is a sale or a deed of settlement or gift. It is not a sale, for there is no purchase-money referred to in the agreement. A sale is well understood. A mere exchange is not a sale; the transaction must be in the nature of a purchase, a real bargain and sale: *Ex parte Miller & Gray (c)*. It is an agreement to support the donor, and would generally be called a settlement. No money need pass at all, the donor receiving merely lodging and clothes. It does not come within the schedule to the Act No. 1274 (viii.), which refers to a transfer for “a *bond fide* adequate pecuniary consideration,” because there is no evidence that the consideration is “adequate,” and it is not “pecuniary.” The document is therefore liable to be assessed as an ordinary deed of settlement. The Collector made the assessment before the decision in the case of *In re Twopenny*, and no doubt was in error when he assessed the duty upon the face value of the security. The real question at issue, however, between the parties is whether the transfer was a sale or deed of settlement.

Cussen in reply—The consideration is a pecuniary one, if you look at the intention of the parties expressed in the deed: *Gaskin v. Rogers (d)*. The transferee has to “expend” the sum of 50*l.* a year. The mere “keeping” of the vendor would not be a compliance with the terms of the deed.

HOOD, J. An agreement, bearing date 7th September 1898, made between M. L. Lang and L. A. Lang, recites that the said L. A. Lang is the registered proprietor of certain lands, freehold and leasehold, and that such lands have been transferred to M. L. Lang, and the deed declares that the said M. L. Lang, in consideration of such transfer, shall expend and apply the sum of 50*l.* per annum during the rest of the natural life of the said L. A. Lang in keeping and maintaining the said L. A. Lang, and to secure the performance thereof the deeds are to remain in the custody of L. A. Lang. The first point for determination is whether that is a sale of the lands by L. A.

(c) [1892] 18 V.L.R. 31.

(d) [1866] L.R. 2 Eq., p. 291.

Lang to M. L. Lang, and I have not the slightest doubt that it is not. A sale contemplates the parting with property for a money consideration, and also contemplates a delivery of the property sold on the payment of the money. This, in my opinion, is merely a mode of providing for the support of the owner of the property during her lifetime, and is more like an attempt to evade succession duty by transferring properties to a child during the lifetime of the parent, the child undertaking to support the parent until she dies. I therefore think that this is not a sale.

The second point is whether this is a settlement within the *Stamps Acts*, and I think it is, as it was not given for a *bond-fide* adequate pecuniary consideration. I think there was a *bond-fide* consideration, but there is no evidence to show whether it is adequate or not. It is also clear that there was no pecuniary consideration. The consideration the donor gets is not any sum of money; it is support and maintenance, fixed in amount, which she is to have supplied to her during life—certain food, clothes, and lodging up to an amount fixed by agreement at 50*l*. That is not a pecuniary consideration. What she gets is not money, but board and lodging. I think, therefore, that this is not a sale, but that it is a settlement within the Acts. As to the amount of duty assessable, I think the Collector is wrong. It appears that he treated the leaseholds as taxable on the value of them—that is, the value assessed by the municipal corporation for rating purposes. That valuation would be irrespective of any charges payable by the person holding the property; but when the consideration of the assessment under the *Stamps Act* comes into question it is a mistake to treat the matter in the same way. The person liable to the duty is only to pay on the actual value of the land conveyed. In this case the leasehold is subject to Crown rents, and these should be taken into consideration in arriving at the value of the property. The Collector also was in error in taking the mortgages at their face value. The decision in *Twopenny's Case* by the Full Court shows that the taxation imposed on any security is to be assessed on the market value of such security, and not on the nominal or face value of

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the same. I answer the first question in the affirmative. (Counsel intimated that the amount of duty chargeable in view of His Honor's directions would be 3*l.* 8*s.* 7*d.*)

Repayment of the excess of duty was ordered.

Solicitors for appellant: *Lamrock, Brown & Hall.*

Solicitor for the Collector of Imposts: *Guinness, Crown Solicitor.*

W. H. M.

F.C.

1899
April 20.

REG. v. ALLSOP.

Criminal law—Perjury—Corroborative evidence—Direct evidence of several witnesses.

A prisoner was charged with having committed perjury. The perjury consisted in the prisoner having sworn that she had had no beer in her possession since coming out of gaol. Three witnesses were called for the prosecution, each of whom swore that on different occasions, all such occasions being since the prisoner had come out of gaol, he had been supplied with beer by the prisoner. There was no evidence to corroborate the evidence of each witness as to each occasion.

Held, that the evidence was sufficient to sustain the charge of perjury.

Reg. v. Hall (16 V.L.R. 503) distinguished.

THIS was a special case stated by Holroyd, J., for the opinion of the Supreme Court.

The following was the case stated:—

“At the last criminal sittings of the Supreme Court holden at Beechworth Mary Maria Allsop was tried before me and convicted of perjury. It was proved, as for the purpose of the case which I am now stating the jury must be taken to have found, that in the Court of Petty Sessions at Rutherglen on the 17th of January 1899, on the hearing of an information against the prisoner for unlawfully selling liquor without a license, she not being the servant or agent of a licensed person, the prisoner having been duly sworn deposed that she had had no beer in her possession since coming out of gaol, she having been liberated from gaol on the 23rd of November 1898. Evidence was adduced by the Crown to show that this statement was false, which so far as material was as follows:—

"Henry Gallagher, sworn, and examined by the Crown Prosecutor, said—'I am a miner residing at Great Northern Extended. I know prisoner and her house at the Great Northern Extended. I had beer at her place, not dandelion beer or ale, on different occasions—a bottle of beer on Christmas night, and on other occasions both before and after. There were several occasions after she came back on the 23rd of November. I paid her on Christmas night and all the other occasions.'

"Henry Story, sworn, and examined by the Crown Prosecutor, said—'I am a baker at Great Northern Extended. I know prisoner and her house at Great Northern Extended. I remember her being away, and coming back towards the end of November. After that I had drink at her place—beer and dandelion ale. By beer I mean ordinary malt liquor. I had beer there more than once after she came back. I remember having some on Christmas afternoon about 3 p.m. Steve Boyd, a friend, was with me. I don't remember which of us paid, or whether either of us paid on that occasion. About a week before Christmas I had some beer at her place and paid for it.' In cross-examination this witness said, 'I do not know what bitter ale is. I never drank bitter ale under that name. I have drunk tonic beer. I did not taste what Boyd drank.'

"Stephen Joseph Boyd, sworn, and examined by the Crown Prosecutor, said—'I am a miner of Rutherglen. I know prisoner and her place at Great Northern Extended. I have had beer at her place three times. Once about a week before Christmas, and again on Christmas Day. Story paid.' In cross-examination this witness said—'On Christmas Day I was with Story at about three o'clock. I did not see Story pay.'

"After I had charged the jury the witness Story was recalled at their request, and said, in answer to their questions—'I am positive the drink I had on Christmas Day was not dandelion ale. I got it and drank it for beer. It was not a temperance beverage of a similar colour to dandelion ale. As far as I know anything about beer, it was beer.'

"The witness Boyd was also recalled at the request of the jury, and said, in answer to their questions—'I am positive the drink I had on Christmas Day was not dandelion ale. I am

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positive it was not a temperance beverage. I cannot swear about the colour. If I went into an ordinary public-house and asked for beer, I should expect to get what I got on Christmas Day.'

"Before I charged the jury, counsel for the prisoner, Mr. Maxwell, submitted that there was only one witness without corroboration to support the assignment of perjury in the prisoner's statement that she never had any beer in her possession since coming out of gaol. He contended that every act of serving beer to customers alleged against her should have been proved, either by two witnesses, or at least by one witness with circumstances of corroboration, in order to render the evidence of such act available in support of the perjury so assigned, and that no such act had been so proved. He cited *Regina v. Hall* (16 V.L.R. 503), which at first sight seemed to me to be an authority for his contention, but, having some doubt whether that case really governed the present one, or, if it did, whether it had been correctly decided, I thought it better to send the facts to the jury, and, if necessary, to submit a case upon the point raised to the Full Court. I accordingly directed the jury that every witness who deposed to having been supplied with beer by the prisoner at any time between the 23rd of November 1898, the date of her liberation from gaol, and the 17th of January 1899, when she gave evidence in the Court of Petty Sessions, contradicted her statement that she had no beer between those dates, and consequently that there was evidence upon which, if they believed it, they might find the prisoner to have committed perjury. The question for the Court is whether my direction was right.

"E. D. HOLROYD."

Maxwell for the prisoner — The evidence to sustain a charge of perjury must be corroborated; there is only the evidence of one witness as to each particular occasion, and the Court will not accept the statement of one person's oath against the oath of another in a charge of perjury. In *Russell on Crimes* (6th ed.), p. 368, it is distinctly laid down that the evidence of one witness is not sufficient, and the material circumstance

alleged must be corroborated. In *Reg. v. Hall* (a) it was decided that the evidence of other witnesses as to what occurred on similar occasions is irrelevant as corroborative evidence.

[A'BECKETT, J. But it is not put as corroborative evidence in the present case; there is specific direct evidence of three witnesses which shows that the statement made by the prisoner was false.]

But each statement made by each evidence is uncorroborated and has to stand by itself, so that it amounts merely to the oath of one person against the oath of another. This case comes clearly within the principle laid down in *Reg. v. Hall*.

[WILLIAMS, J. The case of *Reg. v. Shaw* (b) is directly in point and is conclusive against you.]

I admit that that is so, but it is also in direct conflict with the decision of *Reg. v. Hall*.

Counsel referred to the case of *Reg. v. Boulter* (c).

J. A. Gurner for the Crown was not called upon.

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, HOLROYD, and A'BECKETT, JJ.] This is a special case stated by Holroyd, J. At the trial of the prisoner, she was charged with having committed perjury, and was convicted of that offence. The perjury she is alleged to have committed consisted in her having sworn that she had no beer in her possession since coming out of gaol. It is to be noted at the outset that that is a general assignment of perjury; it is not a specific assignment, it is that she had no beer in her possession since coming out of gaol. Three witnesses were called by the Crown, who deposed to the fact that on different occasions since the prisoner came out of gaol they had beer supplied to them by her. The fact, therefore, in issue or upon which the perjury depended was, did she have beer in her possession since she came out of gaol? And there are three witnesses called to negative her statement that she had not, and to prove the falsity of that statement. It is not a question of corroborative evidence, but

(a) [1890] 16 V.L.R. 503.

(c) [1852] 3 Car. & Kir., p. 238.

(b) [1865] Leigh & Cave's Crown

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three witnesses are called who give direct testimony that since she came out of gaol she did have beer in her possession. Though it is true that each witness deposed to having got the beer on different occasions, it was all directed to a time *since* she came out. It appears to me that the rule of law is satisfied—viz., that to convict of perjury you must have two witnesses to prove that the fact alleged by prisoner is false, or one witness with corroborative evidence. The question of corroboration does not arise here, because you have three witnesses to prove that the fact, to which the prisoner swore was absolutely untrue. Without any authority that would appear to settle the matter, but there is an authority of high character in support of that view. In the case of *Reg. v. Shaw (d)* the prisoner was charged with having committed perjury in that he swore he was not in a certain public-house on a certain day, and also that he was not on that day even in the particular village in which the public-house was; a policeman was called and swore that he saw him in the public-house on that day, another witness was called who swore that he saw him near the public-house and going in its direction on that day, and a third witness proved that he saw him in the village on that day. As to the first assignment the Court held that there was only the direct evidence of the policeman, but that that evidence was corroborated by the fact that another witness saw him near the public-house and going in its direction. As to the second assignment the Court did not deal with the question of corroborative evidence; they said it was not a question of corroboration, but that there was direct evidence of three witnesses that the prisoner was in the village. Here it is exactly the same. There are three witnesses who say this prisoner did have beer in her possession since she came out of gaol. Then it is said we are confronted with an opposite authority in *Reg. v. Hall (e)*, upon which Mr. Maxwell relies. I am free to admit that at first sight it did appear to me to be an authority in favour of the prisoner, but when looked at it is clearly distinguishable, and, as far as we can judge, rightly decided. In that case there were six assignments of perjury

(d) Leigh and Cave's Crown Cases (e) 16 V.L.R. 503.

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against the defendant. Three of them were general in their terms (as in the present case) and three were specific assignments (His Honor read the assignments as set out in the report). In delivering judgment the Court said—"The whole of the charges against the prisoner must have been affected in the minds of the jury by the evidence on these three assignments;" that refers to the three *general* assignments, because the judgment proceeds—"The other three assignments are specific assignments, charging him with having stated falsely that he never asked a particular person to sign a statement or biography. The jury have found a general verdict. That verdict cannot stand, as it was in part founded upon assignments for perjury which were not proved" (that again refers to the three specific assignments), "and the jury ought to have been directed not to find for the Crown on them. The case must therefore go down for trial again." Now, what I understand the Court to have done is this: as to three assignments there was no such evidence as the law requires; as to the other three assignments there was sufficient evidence. The whole six assignments went to the jury, and the jury found a general verdict, and the evidence upon one set of the assignments no doubt influenced the finding of the jury upon the other set, and under those circumstances the Court would not quash the conviction. And why? Because there was evidence to go to a jury upon certain of the assignments, while upon the other three there was not, so they adopted the course of ordering a new trial. It is possible that there are dicta in that case which go further than the law warrants, but the conclusion is one from which we see no reason to differ.

Conviction affirmed.

Solicitor for Crown : *Guinness*, Crown Solicitor.

Solicitors for prisoner : *Gavan Duffy, King & Ahearn*.

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[LUNACY JURISDICTION.]

IN RE DICKSON.

Lunacy Act 1890 (No. 1113), ss. 129, 130—Lunatic domiciled abroad—Foreign commission—Master in Lunacy—Committee—"Management"—Costs.

The Court may, under sec. 130 of the *Lunacy Act 1890*, when giving "orders in respect of the management" of a lunatic's estate, direct the Victorian committee to realize the personal estate, and to remit the proceeds to the committee of the lunatic's residence and domicile.

There is no jurisdiction to provide for the costs of an application under sec. 130 of the *Lunacy Act 1890* out of the lunatic's estate.

MOTION on behalf of the Master in Lunacy under the *Lunacy Act 1890*, sec. 130, for leave to file of record in this Court a copy of an inquisition taken in New Zealand, and duly certified by the proper officer of the Supreme Court of that province, whereby one Frances Dickson was found of unsound mind and incapable of managing herself and her affairs, and for the appointment of the Master as committee in Victoria of the estate of Frances Dickson, and for certain directions in respect of the management of her estate in Victoria.

The evidence before the Court disclosed that the lunatic was domiciled in New Zealand, and that an inquisition had been held in the matter before a Judge of the Supreme Court of New Zealand, under the provisions of the Act of the Parliament of New Zealand known as the *Lunatics Act*, 46 Vict. 1882 (No. 34), and a copy of the inquisition was duly verified and certified. It also appeared that the Public Trustee of New Zealand was by the law of that province the committee in New Zealand of the person and estate of the lunatic, and that the present motion was made at his request. An Act of the New Zealand Parliament, the *Public Trust Office Act*, 58 Vict. 1894 (No. 50), was before the Court.

It was shown by the evidence that the lunatic was incurable, and was detained in a public asylum in New Zealand; that her estate in New Zealand consisted of a small piece of land and a house, upon which her husband and family, a son and daughter, resided; that the means of her husband and family were very limited, and that the husband and daughter were in ill health. The estate of the lunatic in Victoria consisted of

land at Ballarat, moneys deposited in the Savings Bank and on fixed deposit with the Colonial Bank of Australasia in Melbourne, and some preference shares in this bank.

The motion asked that the Master might be empowered to collect, get in, and realize the real and personal estate of the lunatic in Victoria, and remit the proceeds to the Public Trustee in New Zealand.

Notice of the motion was not served upon the lunatic.

Starke in support—The Court in Victoria will, by reason of the comity of nations, recognize the appointment of the Public Trustee. The position of the Public Trustee is defined by the New Zealand Act, 58 Vict. 1894 (No. 50). Sec. 29 of this Act shows how funds in his hands may be dealt with. All the moneys received by the Public Trustee are paid into a common fund and invested as one fund, but that fund is guaranteed by the consolidated revenue of New Zealand. Handing the principal over is management, though it may conclude the management. The Court recognizes the committees appointed in foreign countries. If the foreign country is also the domicile then the foreign committee is recognized. The Court will order money to be handed over to committees in foreign countries. Sometimes only the income is given: *In re Brown* (a); *In re De Linden* (b). The word "management" is not limited in meaning. The section was passed after the decision of Webb, J., in *In re Crozier* (c), because he held in that case that the Court had no summary power of appointing a committee. That case also decides the right of the Public Trustee to get in the personal estate in Victoria, and this motion is at his request. The administration of the estate in Victoria is ancillary to that in New Zealand. Sec 230 recognizes that the Court in dealing with a lunatic's estate may hand over stocks and shares to a foreign curator. (Counsel referred to *Dicey on Conflict of Laws*, rule 136.) On the materials before the Court it is admitted there is no jurisdiction to order a sale of the real estate.

(a) [1895] 2 Ch. 666.

(b) [1897] 1 Ch. 453.

(c) [1887] 13 V.L.R. 362.

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HOOD, J. I think this is an application that I ought to grant. There is some doubt as to the strict construction of sec. 130 of the *Lunacy Act* 1890, which provides for giving directions as to the management of the estates of lunatics, but the section is one which should, in my opinion, be liberally construed in cases like this, and I think I am at liberty to read the word "management" as meaning to collect the personal assets, realize them, and remit the proceeds to the Public Trustee in New Zealand. The Master may lease the realty and remit the proceeds to the Public Trustee.

Starke—I ask for an order under secs. 229 and 231, directing the manager of the Colonial Bank at Melbourne to transfer the shares in that bank at the direction of the Master in Lunacy. He is merely curator. There is no vesting: *In re Brown (d)*. On the question of costs, it is submitted that sec. 128 gives power to the Court to make provision for the costs of this motion out of the lunatic's estate, because sec. 130 is merely a summary method of effecting the same purpose as the inquiries mentioned in that section. The motion is merely a substitute for the inquiry; but if not, there is inherent power in the Court to make such an order.

HOOD, J. I grant the order directing the manager of the Colonial Bank to transfer the shares to any person at the direction of the Master in Lunacy.

As to costs, I think sec. 128 applies only to an inquiry, and, therefore, does not cover the present case. I see no power to grant costs.

Application granted.

Solicitors for the applicant: *Weigall & Dobson.*

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(d) [1895] 2 Ch. 666, per Lindley, L.J.

[IN CHAMBERS.]

IN RE SHARP. RUSSELL v. SHARP AND OTHERS.

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March 29.
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Limitation of action—Money due upon mortgage—Settlement—Husband and wife—Constructive payment—Cause of action—Supreme Court Act 1890 (No. 1142), s. 83.

In 1866, by an ante-nuptial settlement, certain moneys were settled upon trust to pay the income thereof to the wife of the settlor during her life, and after her death to hold the same for the issue of the marriage. The moneys so settled were, in September 1871, advanced by the trustees to the settlor upon mortgage. The mortgage contained a covenant for repayment of the money advanced, and interest, on 30th March 1872; but there was a proviso that if the interest was punctually paid to the mortgagees, the latter would not call in the principal sum until September 1882. There was no evidence that any interest was paid. The settlor and his wife lived amicably together from the date of the settlement until her death in 1892.

Held, that this latter fact did not give rise to an inference of payment of interest, and did not amount to constructive payment, and that therefore the *Statute of Limitations* began to run on 30th March 1872.

In re Hawes (62 L.J. Ch. 463) distinguished.

ORIGINATING SUMMONS.

Thomas Colin Sharp, who died 31st January 1898, by his will dated 29th April 1897 appointed the Equity Trustees Executors and Agency Company Limited executor and trustee thereof, and directed his trustee to convert all his estate into money, and to stand possessed of the moneys arising from the conversion upon trust, after payment thereof of a legacy of 50*l.* to the Ballarat Hospital, to divide the rest and residue into twelve equal parts; and the testator gave two of such twelfth parts to his son Thomas Colin Sharp the younger, two other twelfth parts to his son James Herbert Welsby Sharp, four twelfth parts to his daughter Janet Mary Sharp, for her separate use, without power of anticipation, and after her death to her children, and the issue of any of her children who may have died in her lifetime, in equal shares *per stirpes*. In case of her death without issue the testator gave the said four twelfth parts to his three sons in certain proportions; and the remaining four twelfths he gave to his son John Adair Sharp. The testator directed that the share of his daughter during her life, and of his son John Adair Sharp until his coming of age, should be invested by his trustee upon first mortgage of real

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estate in Victoria or in Victorian Government or municipal debentures, or in debentures of the Melbourne and Metropolitan Board of Works. And he authorized his trustee in his discretion to postpone the conversion. By a codicil dated 13th August 1897 the testator appointed his son Thomas Colin Sharp and the Equity Trustees, etc., Company executors and trustees, but in all other respects confirmed his will. By a further codicil dated 10th January 1898 the testator confirmed his original will in all particulars material to and stated in this report.

On the 7th February 1866 an ante-nuptial settlement was executed by and between Thomas Colin Sharp, Mary Elizabeth Welsby Russell, his intended wife, and three trustees therein named, by which the sum of 1500*l.* and certain personal effects were settled by him upon trust, *inter alia* that after the marriage the trustees or trustee for the time being should during the lives of T. C. Sharp and M. E. W. Russell, and the life of the survivor of them, with their, his, or her consent in writing, and after the decease of such survivor then at the discretion of the trustees or trustee for the time being, to lay out and invest the sum of 1500*l.* upon certain securities, including real estate and bank shares in the colony of Victoria, and to pay the interest, etc., to M. E. W. Russell during her life,*or to pay the same "to such person or persons as she shall by note in writing notwithstanding any coverture she may be under but not by way of anticipation direct and in default thereof to pay the same interest etc. into her own hands or otherwise to permit her to receive the same for her sole and separate use and free from the debts control and engagements of any husband and so that she shall have no power to anticipate the said interest etc." And from and after the decease of the said M. E. W. Russell the trust moneys and the furniture were to be held in trust for the children "and remoter issue" of the marriage in equal shares in default of any appointment by the parents or by the survivor of them.

The trustees under the settlement received the money and invested it in bank shares and upon mortgage. In 1871 they called in the investments, and on 30th September 1871 the

trustees advanced the 1500*l.* to Thomas Colin Sharp upon mortgage of real estate in Grey-street, East Melbourne. Under the instrument of mortgage the mortgagor covenanted with the mortgagees to repay the moneys on the 30th March 1872 with interest at 6 per cent. There was also a covenant by the mortgagor Sharp "that if the said sum of 1500*l.* or any part thereof shall remain unpaid after the said 30th March next he . . . will so long as the same sum or any part thereof shall remain unpaid pay to" the mortgagees interest thereon at the rate of 6 per cent., payable half-yearly on 30th March and 30th September. "Provided always . . . that if the said Thomas Colin Sharp . . . shall on every 30th March and 30th September until the 30th September 1881 or within thirty days after each of the said days respectively pay to" the mortgagees interest upon the 1500*l.* at the above rate up to the same half-yearly days of payment respectively, and "shall perform . . . all the covenants . . . herein contained and on the part of the said Thomas Colin Sharp . . . to be performed then" the mortgagees "will not before the 30th September 1881 call in the said principal sum of 1500*l.* or any part thereof. Provided also and it is hereby agreed and declared that the said Thomas Colin Sharp . . . shall not before the said 30th September 1881 compel the said" mortgagees to receive the 1500*l.* or any part of it. It was further agreed between and by the several mortgagees that the 1500*l.* was money belonging to them on a joint account. The mortgage deed also contained a power of sale by the mortgagees, exercisable after the 30th March 1872, but with this proviso—"Provided always and it is hereby declared and agreed that the said George Thomson Bald, Joseph Dougall, and Thomas Russell or the survivors or survivor of them or the executors or administrators of such survivor their or his assigns shall not exercise the power of sale unless and until default shall have been made in payment at the time hereinbefore appointed for payment thereof of the principal money or interest the payment whereof is intended to be hereby secured and they or he shall have given a notice in writing to the said Thomas Colin Sharp his heirs executors administrators or assigns to pay off the moneys for the

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time being owing on the security of these presents or left a notice in writing to that effect at or upon some part of the said premises hereinbefore expressed to be hereby granted and default shall have been made in payment of the whole or part of such moneys for three calendar months from the time of giving or leaving such notice or unless and until the whole or part of some half-yearly payment of interest which shall become due on the security of these presents shall have become in arrear for one calendar month and every such notice as aforesaid shall be sufficient though not addressed to any person or persons by name or designation and notwithstanding the person or any of the persons affected thereby may be unborn unascertained or under disability." There was also a proviso that the mortgagor attorned tenant from year to year to the mortgagees in respect of the mortgaged premises at a yearly rent of 90*l.*, dating from 30th September 1871, and payable half-yearly, together with a proviso for re-entry without notice. The mortgagor covenanted also to insure the mortgaged premises against fire in the names of the mortgagees.

Thomas Colin Sharp and Mary Elizabeth Welsby Sharp lived together as man and wife amicably and continuously from the date of the indenture of settlement until 28th May 1892, when the wife died. There were four children of the marriage, viz.—Thomas Colin, James Herbert Welsby, Janet Mary, and John Adair, who were still living, and all except the last-named, John Adair Sharp, had attained the age of twenty-one years. During Mrs. Sharp's lifetime no appointment was made in pursuance of the power in the settlement. T. C. Sharp did not during his life exercise any power of appointment under the settlement. Probate of his will and codicils was granted to the executors, the Equity Trustees Executors and Agency Company Limited and Thomas Colin Sharp the younger, on 27th April 1898.

An originating summons was taken out by Thomas Russell as the sole trustee of the indenture of settlement made by and between T. C. Sharp and M. E. W. Russell, asking that the following matters arising in the administration of the trusts of the settlement and of the estate of T. C. Sharp be determined:—

1. Whether the sum of 1500*l.*, being moneys lent by the

trustees of the ante-nuptial settlement to Thomas Colin Sharp deceased, is payable by the executors and trustees of the will and codicils of T. C. Sharp out of his assets to the plaintiff as trustee of the settlement, or whether payment of this sum is barred by the *Statute of Limitations*?

2. Whether interest on the said sum of 1500*l.* is payable by the executors and trustees of the will and codicils of Thomas Colin Sharp deceased to the plaintiff as trustee of the settlement, and if so, from what date and at what rate?

3. To what person or persons do the proceeds of the furniture comprised in the ante-nuptial settlement belong, and in what shares?

Hayes appeared for the plaintiff—The *Statute of Limitations* does not run until 1881. The mortgage is under seal, and the principal moneys were not due under it until 30th September 1881. In another view, the statute began to run upon the death of Mrs. Sharp.

Counsel referred to *In re Hawes* (a).

F. G. Duffy appeared for James H. W. Sharp, John Adair Sharp, and Janet Mary Sharp—There is a covenant of the mortgage to pay the 1500*l.* in 1872. The money is then due, and the later covenant, deferring payment until 1881, only operates if T. C. Sharp did certain things, which he has not done. In the case of *In re Hawes* the parties appear to have had a common purse, and the decision is based on the fact that husband and wife are one. Where the same hand both gives and receives there is no need of a receipt. When the wife was incapable of holding property, payment to the husband was payment to the wife: *Caton v. Rideout* (b). That view is no longer tenable.

[*Hayes* referred to *Topham v. Booth* (c).]

The fact that husband and wife live in amity is not sufficient.

Herbert Barrett appeared for T. C. Sharp—The statute does not run. As soon as it is proved that the husband and wife

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(a) [1892] 62 L.J. Ch. 463.

(b) [1850] 19 L.J. Ch. 408.

(c) [1887] 35 Ch. D. 607.

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lived together in amity, the payment of the money is to be presumed. There is no evidence that she did not ask and that she was not paid. It is not essential that the money should actually pass : *Maber v. Maber* (d).

Schutt appeared for the Equity Trustees Executors and Agency Company Limited.

HOOD, J. The question here is whether the *Statute of Limitations* has run in this case. In my opinion it has. The covenant by the mortgagor is to pay the principal at the termination of six months, with a proviso that if the interest is regularly and punctually paid the principal sum should not be called in for the period of ten years.

The only point therefore in the case is whether or not payment, or what would amount to payment, of interest has been made. It is admitted that no actual payment has been made to the trustee, but I am asked to draw the conclusion from the facts before me that there has been a constructive payment between husband and wife. This I am utterly unable to do. The case of *In re Hawes* (e), relied upon by Mr. Hayes, is clearly distinguishable. In that case the parties to the settlement were living together amicably, the wife knew of her rights, and words were used by her which showed that the moneys of both formed a common fund for housekeeping purposes. The wife was quite content that the husband should use the money in that way instead of paying it to her and receiving it back again. In the present case the only fact before me is that the parties were living together as man and wife in amity, and from this fact I am asked to presume that something which amounts at law or in equity to payment took place. I think this is a violent assumption, and I decline to make it. Upon that ground I decide that the debt is barred. The same answer will apply to the second question. The third question seems to me utterly unnecessary, but my answer to it is that the same person takes the proceeds of furniture as would have taken the furniture itself.

(d) [1867] L. R. 2 Exch. 153.

(e) 62 L.J. Ch. 643.

The costs of Janet Mary Sharp and John A. Sharp will be paid by the plaintiff. I fix these at 3*l.* 3*s.* The Equity Trustees, etc., Co. Ltd. will get its costs out of the estate as between solicitor and client. I say nothing about the costs of defendant T. C. Sharp. The plaintiff will bear his own costs.

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Solicitors for plaintiff: *Goldsmith & Sharp.*

Solicitor for defendants J. A. and J. M. Sharp: *Newman.*

Solicitors for defendants the Equity Trustees, etc., Co. Ltd.:
Abbott & Beckett.

Solicitors for defendant T. C. Sharp: *Evans & Masters.*

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[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

DEVERIA v. DEVERIA.

Practice—Procedure—Divorce—Personal service—Substituted service—"Cannot"
—Jurisdiction of Court—Divorce Rules 1885, r. 10—Marriage Act 1890 (No.
1166), s. 108.

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The Court has no power under sec. 108 of the *Marriage Act* 1890, and r. 10 of the *Divorce Rules* 1885 to order substituted service of a citation on a respondent who may be personally served.

The word "cannot" in r. 10 does not mean inability by reason of want of money.

APPLICATION by a petitioner in a suit for dissolution of marriage to dispense with personal service of the citation upon a respondent who was now resident in Singapore. The facts are set out sufficiently by Hodges, J., when giving judgment.

Woolf for the applicant.

Cur. adv. vult.

HODGES, J. I was asked in this case to dispense with personal service and to grant some mode of substituted service. The affidavit was founded upon a notion that an application would be made that the Court should direct that the service might be proved by affidavit evidence, but that was abandoned on the application as one which the Court could not grant, and it

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was then asked to dispense with personal service on the ground that the respondent was in Singapore and that it would be expensive to serve him, and the petitioner was a person of no large means—practically, of very small means. It was contended that I had power to grant this application under sec. 108 of the *Marriage Act* 1890, which provides that “every such petition shall be served on the party to be affected thereby either within or without Victoria in such manner as the Court shall by any general or special order from time to time direct and for that purpose the Court shall have and exercise all the powers it now possesses by law. Provided that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do.” The general order on the subject is rule 10 of the *Divorce Rules*, which provides that “in cases where personal service cannot be effected application may be made to the Court or a Judge to substitute some other mode of service or to dispense with service altogether and every such application shall be made upon affidavits stating when where and for what period the person to be served lived within the colony of Victoria and whether as married or single and where such person is and is domiciled at the time of the application and also the means or mode of service expected to be effected.” Now, it is contended that under the Act and the rule taken together, I had power in this case to order some mode of substituted service. I observe with regard to rule 10 that it says that in cases where personal service *cannot* be effected application may be made to the Court. In this case service can be effected, and the only difficulty arises from the fact that it will cost money, but the word “cannot” in no way applies to this case except in the sense that the petitioner is a poor person and has not the means to effect personal service. In my opinion it would introduce into the administration of justice most dangerous principles if the Court proceeded to consider whether a suitor was poor or rich, the extent of his means and the amount of expense it would put him to do this or to do that. Taking this case as an instance, if the petitioner were a wealthy person, then he would be called upon to expend his money in serving. If he were not wealthy, but were possessed of moderate

means, the Court would have to investigate the extent of his means to see whether it would be fair to make him expend so much of his means to effect service in Singapore. If the person were impecunious, then the application might be made to dispense with personal service, even if the person to be served were in Victoria, because the petitioner had not the means to send anyone to Ballarat, Bendigo, or Castlemaine, and therefore it would be a denial of justice not to make an order dispensing with personal service. This would be a most dangerous principle, and I do not think it is the meaning of "cannot" in the rule, and therefore I do not think I can direct substituted service in this case. I have been unable to find any authority where the Court has on such a ground dispensed with personal service and directed some other mode of service. I must therefore refuse the application.

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Application refused.

Solicitors for applicant: *Crisp, Cameron & Rennick.*

R. H. C.

[IN CHAMBERS.]

CORSAIR CONSOLIDATED GOLD MINES LIMITED v. GRAY.

Practice — Discovery — Order — Non-compliance — Dismissal of action — Delay —
" Rules of Supreme Court 1884 " — Order XXXI., rr. 12, 21.

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April 17.
Holroyd, J.

Where an *ex parte* order for discovery has been obtained the other party has the right in any subsequent proceeding to object that such order was made on insufficient grounds or was unnecessary.

SUMMONS in Chambers.

Application on summons by the defendant in an action upon a foreign judgment for an order that the action be dismissed for want of prosecution by reason of the plaintiff's non-compliance with an *ex parte* order for discovery.

The plaintiff had brought an action against the defendant in the High Court of Justice in England for the amount of calls due by the defendant. The plaintiff obtained leave from the Court in England to serve the writ of summons upon the defendant, who, at the time of the institution of proceedings,

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was resident out of the jurisdiction of the High Court. The defendant did not enter an appearance to the action, whereupon judgment in default of appearance was signed against him for the amount claimed. On this judgment an action was instituted in Victoria by the plaintiff, and pleadings delivered, the reply on 21st February 1899. There were no subsequent pleadings. On 29th March 1899 the defendant applied *ex parte* for and obtained an order for discovery of documents. With this order the plaintiff had not complied. The documents of which the defendant desired discovery were the copies of affidavits filed by the company on the application in England for leave to serve the writ out of the jurisdiction. The plaintiff did not apply to set aside the order for discovery. In his defence the defendant alleged that he had never submitted to the jurisdiction of the High Court in England.

Coldham for the defendant in support.

Mitchell for the plaintiff to oppose—The power given by the rule is not absolute. The Judge has a discretion.

[HOLROYD, J. Here is an order of Hood, J. No order setting that aside has been made. It therefore stands.]

That order was made *ex parte*. If it can be shown that no more documents can be discovered the Court will not make the order now asked for: *Hartley v. Owen* (a). Order XXXI., r. 12, Form of Order—there is nothing to show that this order was necessary, and if it is shown to be unnecessary no order will be made. Order XXXI., r. 12, does not say that the party is to make an affidavit of documents by its secretary or other proper officer, as in the case of interrogatories. The sole object of the defendant is delay. An action will not be dismissed under Order XXXI., r. 21, unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair discovery: *Danvillier v. Myers* (b). They have taken no steps to set aside the order for leave to serve the summons out of the jurisdiction.

Coldham in reply—The question of delay is not to be con-

(a) [1876] 34 L.T. Ch. 752.

(b) [1883] W.N. 58.

sidered. No summons has been taken out to set aside the order of Hood, J. We do not ask for a peremptory order, as was asked in the cases referred to:

[HOLROYD, J. The difficulty I feel is this: it has not been generally considered in this Court, but was formerly always considered whether the Court would, in the first instance, allow the discovery of documents at all. Now the practice is to allow it without question, leaving the opposite party to object. Every objection which can be taken to show the discovery to be unnecessary can be taken now.]

Cur. adv. vult.

HOLROYD, J. This was a summons taken out by the defendant to get an action dismissed for want of prosecution on the ground that the plaintiff had failed to comply with an order of my brother Hood for the discovery of documents made on the 29th March 1899. The order was made, as is usual in this colony, *ex parte*, and therefore the person against whom it was made has a perfect right in any subsequent proceedings in connection with it to object that it was made on insufficient grounds, and that it was unnecessary. The main object of the defendant appears to be to obtain from the secretary of the company, which is an English company registered in London, discovery of any copies, if such exist, of the affidavit or affidavits upon which the company obtained an order for the service of the writ out of the jurisdiction. If the defendant wanted to ascertain upon what materials that order had been made, he ought promptly to have instituted inquiries as to the contents of the original affidavits upon which the order for leave to serve the writ out of the jurisdiction was founded. He might have done that months ago, and it was the very first thing he ought to have set about. He is going behind the writ of summons, which he has never sought to set aside in the English Courts, and impeaching now in this country the validity of the proceedings as founded upon insufficient materials. The effect of getting discovery of these documents at this time would necessitate a long adjournment of some months. I think the discovery of documents is not necessary, or if necessary in one particular, it is entirely owing to the

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defendant's neglect that he has not obtained it, and I do not think he should be allowed to delay this case any further. It is not necessary for me to consider the objection raised that inasmuch as the order for leave to serve the writ out of the jurisdiction had been granted, and no step had been taken to get that order set aside, no further proceedings could now be taken to object to it. It is not necessary to give an opinion on that point, because I have arrived at the conclusion that I ought to dismiss the summons upon the grounds I have mentioned and to dismiss it with costs.

Summons dismissed.

Solicitors for plaintiff: *Crisp, Lewis & Helderwick.*

Solicitors for defendant: *Blake & Riggall.*

R. H. C.

1898

December 9.

A'Beckett, J.

[IN CHAMBERS.]

IN THE WILL OF PATRICK BYRNE. BYRNE v. BYRNE.

Will—Construction—Omission—Uncertainty—Trust—Residue.

A testator's will ran thus :—" After payment of my just debts funeral and testamentary expenses I give devise and bequeath unto my wife. And I hereby appoint the said M. B. executrix of this my will."

Held, that the whole of testator's estate after payment of the debts passed to M. B.

Evidence to show that the testator intended his widow to take absolutely will not be admitted.

In re Bassett's Estate (L.R. 14 Eq.54) approved.

ORIGINATING SUMMONS.

Patrick Byrne, of Docker's Plains, Wangaratta, farmer, executed his last will, dated 6th May 1895, upon a printed form thus :—

"This is the last will and testament of me *Patrick Byrne* of *Docker's Plains near Wangaratta* in the colony of Victoria *grazier*. After payment of all my just debts funeral and testamentary expenses I give devise and bequeath unto *Mary Byrne my wife*. And I hereby appoint the said *Mary Byrne my wife* executrix of this my will. In witness etc."

Patrick Byrne died on 29th November 1895 and on 11th February 1896 probate of the above will was granted to *Mary*

Byrne, his widow. In an affidavit by his widow it was stated that the testator had been ill for some time before the execution of his will, and executed the will in anticipation of a surgical operation, to which he submitted himself next day. It was stated that at the time he made his will he expressed to his wife his intention of leaving everything to her. The testator left him surviving eight children. Doubts having arisen as to the construction of the will a summons was taken out by the executrix asking these questions:—

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(1.) Did the testator die intestate as to his real and personal estate or any part thereof?

(2.) What estate and interest in the real and personal estate does the plaintiff, the widow of the testator, take under the will of the testator?

(3.) Are the next of kin of the testator entitled to share in any and what part of the estate of testator?

This summons now came on for hearing before A'Beckett, J.

Weigall for the plaintiff—There is evidence of intention on the part of the testator to leave the whole of his property to his wife. Even without that evidence the authorities show that this will shows this intention: *In re Bassett's Estate* (a).

[A'BECKETT, J. That is a stronger case. The testator used the words "in case of her death."]

The bequest to her is not stated. The Court had no more right to assume in that case how much was given. The Court will supply the words: *Williams on Executors* (8th ed.), p. 1088, 1089. If an executor was appointed, and the will did not show any intention that another person should take, then the executor took the estate.

Counsel referred to *Jarman on Wills* (6th ed.), p. 327, 328.

[A'BECKETT, J., referred to the *Wills Act* 1890, sec. 32.]

Power for defendant Patrick Byrne, representing himself and all other next of kin—Parol evidence of testator's intention is inadmissible.

[A'BECKETT, J. I do not think it is receivable.]

The subject of gift is uncertain. There is nothing to show

(a) [1872] L.R. 14 Eq. 54.

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what estate, if any, the testator intended his widow to take. In *In re Bassett* there was something more than mere mention of a name. The Court will not act upon mere conjecture. It will not make a will. This will was made by filling in a printed form. The testator attempted to make a disposition of his property, thus showing that he did not intend his executrix to take *quod* executrix.

Counsel referred to *Mohun v. Mohun* (b); *Bowman v. Milbanke* (c).

A'BECKETT, J. I think that, without reference to the authority of *In re Bassett* (d), I should be prepared to hold that there was by inference a general disposition by the testator of everything left after payment of his just debts, funeral and testamentary expenses in favour of his widow. It is clear that the lady is appointed executrix. There is a provision for payment of the testator's just debts, and after that the testator proceeds to "give devise and bequeath," thus showing that he intended to place the whole property under the control of his widow. The words "give devise and bequeath" cannot be intended to be without meaning, and I think he intends to give all his estate. I think the view I should have taken without reference to *In re Bassett* is supported by that decision. I therefore feel less hesitation in giving effect to the view I have formed upon this case.

I declare that the widow takes beneficially the whole of the real and personal estate. I direct taxation of the costs of all parties and their payment out of the estate, those of the plaintiff as between solicitor and client.

I answer the first question—No. The second question—An absolute interest in all the real and personal estate. The third question—No.

Solicitors for the plaintiff: *Gavan Duffy & King* (for *Gavan Duffy, King & Ahearn*, Wangaratta).

Solicitor for the defendants: *M. Mornane*.

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(b) [1818] 1 Swanst. 201.

(d) L.R. 14 Eq. 54.

(c) [1665] 1 Lev. 130.

MACVEAN AND ANOTHER v. MACVEAN AND OTHERS.

Will—Accumulation—Vesting—Rule against perpetuities—Thellusson Act—Wills Act 1890 (No. 1159), s. 35.

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March 13, 20.
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A testator by his will directed his trustees to set apart as a distinct fund one-tenth of the income of his estates, and to accumulate this fund until a certain sum was reached, and then to pay the said sum to one of his sons if and when he attained the age of 30 years, and also directed that if the sum was reached before the son became 30 further additions to the fund should cease, and the future one-tenth income should fall into the residuary trust estate, and that if this son became 30 years of age before the sum had accumulated to postpone the payment until the sum was reached, the testator's expressed intention being that this son should receive that amount, "and neither more nor less," and that if the son did not live to attain 30 the accumulations should fall into the residue.

The son became 31 and died. The accumulations did not reach the sum fixed by the testator.

Held, following *Oddie v. Brown* (4 De. G. & J. 179), that the direction to accumulate was not void.

Held also, that a trust for the son was created, and that the administrator of his estate was entitled to the accumulations.

ADJOURNED SUMMONS.

Hugh MacVean, who died 25th May 1878, by his last will, dated 24th May 1875, devised and bequeathed all his real and personal estate, consisting of the estates known as Poliah and Strathvean, and the live stock and implements thereon upon trust to carry on for such time as his trustees should think desirable the business of a cattle and sheep farmer upon the estates, and he directed his trustees during that time to stand possessed of the yearly profits of the business upon the trusts thereafter declared. The trustees were directed at the termination of this period to sell the testator's real estate, and to call in, sell, and convert such part of his personal estate as did not consist of money, and after sale, calling in, and conversion to hold the moneys arising therefrom as a fund to be called the testator's trust fund, upon trust for investment in certain securities. The trustees were directed to stand possessed of the annual income arising from this trust fund upon trust, "in the first place to set aside and appropriate an equal tenth part of the said annual income and profits for the purpose of forming a distinct fund and to invest the same in manner hereinbefore directed for the investment of my trust fund and improve the

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same as an accumulating fund and add the accumulations thereof to such fund until the same shall amount to the sum of 4000*l.* and to pay the said sum of 4000*l.* to my eldest son, Alexander Donald MacVean, if and when he shall attain the age of thirty years. But if the said sum of 4000*l.* shall have been raised before my said son shall attain the age of thirty years then all interest and income thereafter accruing from the said sum of 4000*l.* shall fall into and form part of my residuary personal estate; and if my said son shall attain the age of thirty years before the said sum of 4000*l.* shall have been accumulated then the payment of the said accumulated fund to my said son shall be postponed until it shall have arrived at the said sum of 4000*l.* my intention being that my said son shall receive the sum of 4000*l.* and neither more nor less from the accumulated fund. But if my said son shall not live to attain the age of thirty years then the said sum of 4000*l.* or so much thereof as shall have been accumulated at the time of his death shall fall into and form part of my said residuary personal estate." The will then provided for the payment of an annuity to the testator's widow and of a certain amount by way of annuity to each of the surviving children of the testator, including Alexander Donald MacVean. The residue of the estate was bequeathed to the children of testator in equal shares. Probate of his will was granted to Allan MacVean and John MacVean, two of the executors and trustees named in the will; the other executor and trustee, James Kininmonth, having renounced probate. The family of the testator at the time of his death consisted of his widow, Marjory MacVean, and nine children, including Alexander Donald MacVean. The latter died on the 11th July 1884, at the age of 31 years. Duncan MacVean, one of his brothers, was, on 21st August 1884, appointed administrator of his estate. Since the death of the testator the trustees had accumulated the fund, in accordance with the testator's directions. At the date of the death of Alexander Donald MacVean this fund amounted to 250*l.* 10*s.* Since that date the accumulation had proceeded until November 1898, when it reached the sum of 2689*l.* 3*s.* 7*d.* The present trustees, Duncan MacVean and Francis Wellington Were, on the request of the surviving

children of the testator, caused to be issued an originating summons to determine what person or persons were entitled to the whole or any part of the accumulated fund. The summons was, on the 13th February 1899, adjourned by Holroyd, J., into Court. On the 13th March following it was further adjourned in order that the administrator of the estate of Alexander Donald MacVean should be represented at the hearing.

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R. Hodgson Cole for the plaintiffs.

Woinarski for the administrator of the estate of Alexander Donald MacVean—If 4000*l.* was accumulated before A. D. MacVean attained the age of 30 the accumulation was to cease, the balance falling into the testator's residuary estate.

[A'BECKETT, J. The provision means this: Set apart one-tenth. Do not do anything until it reaches 4000*l.* When that happens if the son is 30 years old give it him. If it reaches 4000*l.* before he is 30 the surplus goes into residue.]

The testator contemplates that the sum may be 4000*l.* before the son is 30. If so payment is postponed, but the sum is vested when he attains that age. The money falls into residue only if the son die before he attains 30. So far as the testator's intention is expressed, this was a provision set apart for his eldest son over and above the other provision.

[A'BECKETT, J. Suppose the son reached 30, and then went to the trustees and said, "I do not want any further accumulation, hand over to me what you have already accumulated"—in that case I do not think the trustees could have refused.]

Counsel referred to the *Thellusson Act*, 39 & 40 Geo. III., c. 98; the *Wills Act* 1890, secs. 35, 36; *Jarman on Wills* (4th ed.), vol. i., p. 306, citing *Oddie v. Brown* (a).

[A'BECKETT, J. As I understand the passage in *Jarman*, the *Thellusson Act* places a limit, and the cases show that it is so under that Act, but if the direction is one which, apart from the *Thellusson Act* would be bad as exceeding the period of limitation it is altogether bad. What *Jarman* contemplates is that a fund may be directed to accumulate for too long a period,

(a) [1859] 4 De G. & J. 179.

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but that if the person beneficially interested in the fund has a vested interest and can terminate the accumulation the gift is good.]

L. F. S. Robinson for the defendants other than the administrator of A. D. MacVean—The fund is not vested. The direction to raise 4000*l.* and no less sum is absolute, and has not been carried out. A. D. MacVean is to receive 4000*l.*, “neither more nor less.” He is to receive all or nothing. It is a condition precedent to the gift that 4000*l.* shall have been accumulated. If A. D. MacVean attained 30, the trustees could not hand over any sum whatever to him, because they would by this act lose control over certain sources from which the money was to be accumulated. There is no implied present gift in the direction to postpone. The principle of construction is that if there is a present gift and words denoting future payment these words do not postpone the vesting but the payment. But if there is nothing except the payment to constitute the gift, the date of payment is then the date of vesting. Here, if A. D. MacVean attained 30 before the accumulations reached 4000*l.*, “payment of the said accumulated sum . . . shall be postponed.” The word “payment” there constitutes the sole gift. As to the right to stop the accumulations, this falls within the rule that where a fund is clearly vested and there is simply a direction to accumulate until the person beneficially interested attains a certain age, the Court will not withhold from him the management of the fund on his attaining his majority.

[A'BECKETT, J. The reason the Court does this is because the intention of the testator is to create a fund for a certain person, who is the only one entitled. That person says, “I think I should benefit more by being paid now than by waiting,” and the Court orders payment to be made. In the events which have happened A. D. MacVean became the only person interested in the trust, and could have said to the trustees, “You can only hold the fund for me.” If the proper construction were that he took only when the fund reached 4000*l.*, it could never have vested. . If the true construction were “If a certain

fund should reach 4000*l.*, then I give it to my son, but I do not give it unless it does reach 4000*l.*," then your argument would be good. If the testator had said—"If the fund reach 4000*l.* I give it to A. B., but if it will not reach 4000*l.* I give it to C. D.," the bequest would be conditional. I do not think this bequest is conditional upon the fund reaching 4000*l.*]

The rule against perpetuities makes this direction void. If the accumulation could not reach 4000*l.* until more than twenty-one years after the testator's death, the direction is bad under sec. 35 of the *Wills Act* 1890. *Oddie v. Brown* is distinguishable.

[A'BECKETT, J. Why should not this case be an exception?]

[*Woinarski*—This gift is by way of portion for a child.]

It is not a portion. A portion is a sum such as is set apart out of an estate to provide for a younger son. This is something conditional, and beyond what the others have received.

A'BECKETT, J. I stated during argument the view I take of this case. I think it falls within this principle—that there is a trust created which in the events which have happened became a trust for the benefit of Alexander Donald MacVean alone, and therefore that he was in his lifetime in a position in which he might have asserted his right to have that which was the subject of the trust. No one but himself was interested in the fund, and he could have said to the trustees, "Stop the accumulations, and hand over the fund to me." This is the principle acted upon in the case of *Oddie v. Brown*, referred to during argument by Mr. Woinarski, and it excludes the question whether the rule against perpetuities would be violated. The right which Alexander Donald MacVean could have exercised his administrator does not appear to have exercised, and the fund has been allowed to accumulate in the hands of the trustees. The fund belongs to the administrator, and the trustees should pay it over to him. This is not a difficulty arising in the construction of the will—the will is clear enough—but as to the destination of the fund set apart by the will for the benefit of Alexander Donald MacVean, therefore the costs should not fall upon the general estate, but upon the particular fund. The

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question is, what is to be done with it? The questions asked may be answered thus:—

As to the sum of 250*l.* 10*s.*, accumulations up to the date of the death of A. D. MacVean, and as to subsequent accumulations, such sums should be regarded as forming part of the estate of A. D. MacVean, and the whole of the accumulated fund referred to in the questions should be paid by the trustees of the will of Hugh MacVean to the administrator of the estate of Alexander Donald MacVean, subject to the following direction as to costs:—I direct the costs of all parties to be taxed, those of the plaintiffs as between solicitor and client, and when taxed to be paid out of the accumulated fund, the subject matter of these proceedings.

Solicitor for plaintiffs: *A. T. Lewis.*

Solicitor for the defendants other than Duncan MacVean, as administrator of A. D. MacVean's estate: *Brent Robinson.*

Solicitors for Duncan MacVean as administrator: *Madden, Drake & Candy.*

R. H. C.

1899

May 17.

Williams, J.

McGAN v. PRATLEY.

Licensing Act 1890 (No. 1111), s. 121—Permitting thief to be on licensed premises—Receiver of stolen property.

By sec. 121 of the *Licensing Act 1890* a licensed victualler is liable to a penalty for permitting a thief to be in or upon his premises. A person who had been convicted of three offences of receiving stolen property knowing it to be stolen was permitted by a licensed victualler to be on his licensed premises. The licensed victualler was proceeded against and convicted under, sec. 121 for permitting a reputed thief to be on his premises.

Held, that the conviction was bad, on the ground that a receiver of stolen property is not a thief within the meaning of the section.

The effect of sec. 121 discussed.

ORDER *nisi* to review the decision of the Court of Petty Sessions at Port Melbourne. An information was laid against Pratley, a licensed victualler, for permitting a person being a reputed thief to be in or upon his licensed premises. The informant, a police constable, stated that he had warned the defendant and told him of the character of this person. The

informant stated in his evidence that this person was a reputed thief, and he knew him to be so, but the only convictions produced after searching the records were three convictions dated on the same day in 1893 for receiving stolen goods knowing the same to be stolen. One charge was for an offence committed in 1892, and the other two charges were for offences committed on one day in 1893. Since 1893 no charge of any description had ever been brought against this person. There was no proof of any conviction for larceny. The magistrates convicted the defendant, and he was fined. The defendant obtained an order *nisi* to review the decision upon the ground that there was no evidence that T. M. (the person alleged to be a reputed thief) was a thief within the meaning of the *Licensing Act* 1890.

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McHugh to show cause—The evidence of the informant, that he knew this person to be a thief, is sufficient without the production of convictions: *Reg. v. Call, ex parte Fisher (a)*.

[WILLIAMS, J. But the informant spoke from hearsay only, and when the officer was called who was supposed to know the record of this person he could only show convictions for receiving stolen goods.]

Even then the section includes such a person who has received stolen goods. He would come under the broad category of "a thief" and may have been an accessory after the fact, and so really guilty of larceny: *Russell on Crimes* (6th ed.), vol. i., pp. 161, 174, 176. There was some evidence to go to the magistrates that he was a thief.

Finlayson to move the order absolute was not called upon.

WILLIAMS, J. I have no doubt about this case. Sec. 121 of the *Licensing Act* says—"If any licensed victualler . . . suffers or permits prostitutes thieves drunken or disorderly persons to be in or upon any part of his licensed premises . . . he shall forfeit etc. . . ."; then it provides—" . . . the presence of reputed prostitutes or thieves or of

(a) [1869] 1 A.J.R., Notes of Cases, p. 57.

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drunken or disorderly persons in or upon such licensed premises . . . shall respectively be deemed *prima facie* evidence that such licensed victualler knowingly permitted . . . such reputed or other persons to be present with the knowledge that they were prostitutes thieves drunken or disorderly persons. . . .” The word “reputed” in the last clause must refer to “prostitutes and thieves,” and the words “other persons” to “drunken or disorderly persons” referred to above. What appears to be the effect of the section is that if a licensed victualler permits a thief to be in or upon his licensed premises, knowing that he is a thief, he is liable. I should say that that is the construction of the first part of the section. I think it means “knowingly,” although that word is not there. The second part of the section is to this effect: that if the thief is a reputed thief then it is not necessary for the informant to prove knowledge on the part of the licensed victualler, because the fact that the person is a “reputed thief” is *prima facie* evidence that the licensed victualler knowingly permitted the thief to be there. I made an observation during argument that it was necessary for the Crown to prove that the thief on the premises was a reputed thief, and I now qualify that statement. In the first part of the section, if the informant can prove that a man who was a thief was there and that the landlord knew that he was a thief, whether he was a reputed thief or not, he could be convicted. If the informant can go further and prove that the person is a reputed thief, then it is unnecessary to prove knowledge. In this case the man who was on the premises was a man who had had three convictions against him for receiving stolen property knowing it to be stolen. In 1893 he was convicted of three offences of “receiving,” one of the charges being for an offence committed in 1892, the other two charges being with reference to offences committed on the same day in 1893. From that time onwards there were no other convictions against him, nor is there any admissible evidence—that is, proper evidence in the strict sense of the term—that he had broken the criminal law in the way of either receiving or stealing. Now, if these three previous convictions had been convictions of larceny, I should be inclined to say that there was

evidence to go to the magistrates—I am not clear upon the point—that this man was a reputed thief. I do not, however, wish to give any positive opinion upon that point, as it is not necessary, and I am not sure about it. That is not this case. This man was convicted of “receiving,” and it is clear that “receivers” are not mentioned in this section, and I do not think were intended to be included. The section is framed for the purpose of preventing prostitutes and thieves from being on the premises of a licensed victualler, where they might take advantage of those individuals who took too much drink. Such persons would be tempted under such circumstances to relieve drunken persons of their property, and that is the class the section aims at. I do not think that the Legislature had “receivers” in its mind at the time. Whether that is so or not “receivers” are not mentioned, and “receivers” are different from “thieves.” There are cases in which receivers, though receiving, might be prosecuted for the larceny as accessories after the fact. There might be a case of that kind, but the ordinary case of receiving stolen property is a distinct offence. Therefore, on that ground, my other views as expressed being *obiter dicta*, that this man is not a thief within the meaning of this section, the order will be made absolute, with costs.

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Order absolute, with costs.

Solicitor for informant: *Guinness*, Crown Solicitor.

Solicitor for defendant: *Forlonge*.

W. H. M.

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May 4, 11, 17.

IN RE RYLAH, EX PARTE THE COLONIAL BANK OF AUSTRALASIA LIMITED.

Williams, J.

The Insolvency Act 1890 (No. 1102), s. 37 (viii.)—Act of insolvency—False return of sheriff—Judgment debt, failure to satisfy—Power of Court to go behind judgment.

The respondent, upon being called to satisfy a judgment debt, said that he would not pay the same, but told the sheriff's officer that he had land at Benambra which he could levy upon. This land was not in respondent's name, and the sheriff's officer made a return that the respondent had no real or personal estate of which he could cause to be made the money required by the writ or any part thereof. An order *nisi* was obtained to sequester the respondent's estate, upon the ground that he had failed to satisfy the judgment debt and that the writ of *fi. fa.* had been returned wholly unsatisfied.

Held, that the return was false and that the act of insolvency had therefore not been established.

The Court will not, except upon a case of fraud or collusion between the petitioning creditor and debtor, go behind the judgment of the Supreme Court, upon which the alleged debt is founded.

ORDER *nisi* for the sequestration of the estate of George A. Rylah. The petitioning creditor was the Colonial Bank of Australasia Limited, and the petition was founded upon a judgment recovered against the respondent in the Supreme Court. The order *nisi* recited the following act of insolvency :—
“That Thomas Wood the officer charged with the said writ of *fi. fa.* did on the 27th day of February 1899 and before the return of the said writ of *fi. fa.* into the Supreme Court call upon the said George A. Rylah to satisfy the said judgment in accordance with the terms of the said writ of *fi. fa.* but the said George A. Rylah failed to do so and the said writ has been returned wholly unsatisfied as hereinafter appears. That since the said Thos. Wood called upon the said G. A. Rylah to satisfy the said judgment as aforesaid the said sheriff has made the following return to the said writ of *fi. fa.* :—‘The within-named G. A. Rylah has no real or personal estate whereof I can cause to be made the money within required or any part thereof as I am within commanded. The answer of A. McFarland sheriff.’ That the said G. A. Rylah has in consequence of the matters aforesaid within six months of the presentation of the said petition committed an act of insolvency.” The respondent filed the following objections :—

"I intend to dispute the petitioning creditor's debt and the act of insolvency and that I will rely upon all objections appearing on the face of the proceedings and further that I intend to rely upon the following special defences namely:—

"1. That the petition was presented and the order *nisi* obtained not for the legitimate purpose of distributing my estate and effects amongst my creditors nor for the purpose of getting the said petitioning creditor's debt paid by me.

"2. That these proceedings are wholly outside the legitimate purposes and object of the *Insolvency Act* and are based upon proceedings altogether illegal vexatious inequitable and oppressive.

"3. That the petition was presented and the order *nisi* obtained for a purpose foreign to the legitimate object of the insolvency laws.

"4. That the order *nisi* was obtained in fraud and abuse of the insolvency laws.

"5. That I was and have never ceased to be a partner of and with the petitioning creditor in connection with the firm of Gresson and Rylah which carried on business at Omeo in the colony of Victoria.

"6. That the series of transactions which resulted in the promissory notes the subject matter of the petitioning creditor's judgment being given by me arose out of and were incidental to the business of the said firm.

"7. That the said promissory notes were given by me without any consideration whatever.

"8. That the judgment upon which the petitioning creditor's debt was founded represents a debt not due by me solely but by me as a partner with the said Gresson and the said petitioning creditor.

"9. That the petitioning creditor has all my securities and assets in its hands and I have no other estate which can be administered for the benefit of my creditors generally and I have no creditors other than the said petitioning creditor."

Upon the return of the order *nisi* before Williams, J., the petitioning creditor proved the judgment and called evidence to prove demand of payment. The sheriff's officer swore that he, in

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company with another officer, called upon the respondent and asked him to pay the amount demanded, and explained the consequence of non-compliance; that the respondent said "I will not pay, and the bank can do what it pleases." This was corroborated by the other officer. In cross-examination both officers admitted that the respondent said that he had land at Benambra upon which they could levy if they liked, and they said that they or one of them asked whether it was mortgaged, and that he had replied that it was. The respondent upon being examined said that he told the officers that he had land at Benambra, and that in answer to the question whether it was mortgaged he told them it was not. The deeds were produced in Court relating to the land, and they were all in the name of third persons, and not in the name of the respondent. The transfers and contracts of purchase were also produced. The respondent said the lands were worth about 90*l*. The amount of the debt was 165*l*.

W. H. Moule for the petitioning creditor to move the order absolute—The first four objections are informal; they do not set out "the particulars of any such defence" as required by sec. 45 of the *Insolvency Act* 1890. To take advantage of the grounds alleged the respondent should have proceeded by a substantive motion to set aside the order *nisi*, setting out the facts upon which he relied by affidavits. This was done in *In re Hill* (a). The mere objection that the proceedings are in fraud and abuse of the insolvency laws is not a special defence. Particulars must be given.

Woolf to show cause—The same objections were taken in the case of *In re Morrissey* (b).

[WILLIAMS, J. I think you should at the least give particulars.]

No demand has been made for particulars, but I am prepared to state them.

[*Moule*—If particulars are given the objection will be withdrawn.]

[WILLIAMS, J. I am not prepared to say that the notice of

(a) [1894] 20 V.L.R. 97.

(b) *Ante*, p. 776.

objection is bad, as it has been allowed by Holroyd, J., in *In re Morrissey*, but I think particulars must be given.]

Counsel then stated the particulars, but as no further argument was raised by the respondent upon this part of the case they are not set out.

Evidence was then called by the petitioning creditor to prove the judgment and the demand, and the return made by the sheriff.

Woolf—It would be well to have a ruling upon the right of the respondent to go behind the judgment of the Supreme Court, upon which this alleged act of insolvency depends. There are decisions in this Court that it cannot be allowed, but in England the authorities are clear upon the question. In the case of *Ex parte Kibble* (c) it was held that the Bankruptcy Court had inherent jurisdiction to go behind a judgment to ascertain whether or not a real debt existed upon which to found an act of bankruptcy. In *Ex parte Lennox* (d) it was held that the Court of Bankruptcy has power to go behind a judgment and inquire into the consideration of the debt. The Victorian cases of *In re Morris* (e), *In re Lee* (f), and *In re Monks* (g) are inconsistent with the English cases.

Moule—The English cases are founded upon a different section. In England, by the Act of 1883, sec. 7 (3), if the Court is not satisfied with the proof of the debt or of the act of bankruptcy, or for some other sufficient reason, it may dismiss the petition; in Victoria the order *nisi* is granted upon satisfying the Judge of the existence of the debt, and if the respondent wanted to raise the question of the judgment being fraudulent he could have applied to set the order *nisi* aside, and it would have been within the jurisdiction of the Court to adjourn the hearing of the order *nisi* in order to give the respondent an opportunity of testing the validity of the judgment. It would be most inconvenient if, as in this case, when an action has gone to trial, defences raised in the pleadings, and the defendant does

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(c) [1875] L.R. 10 Ch. 373.

(f) [1891] 7 V.L.R. (I.) 117.

(d) [1885] 16 Q.B.D. 315.

(g) [1886] 12 V.L.R. 712.

(e) [1871] 2 V.R. (I.) 2.

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not attend at the trial to defend, that all the issues should be reopened in insolvency proceedings. The Victorian cases are decisive upon the question, and the practice here has been uniform.

WILLIAMS, J. I shall follow the decisions of our own Court.

Evidence was then called for the respondent as set out in the statement of the case.

Woolf—The return of the sheriff is false. There was some real estate which it was the duty of the sheriff to sell in order to satisfy the debt. When a return is made which is not true the proceedings must fail: *In re White (h)*. If the property had been mortgaged no doubt it would not have been the duty of the sheriff to realize: *In re Douglas (i)*. The act of insolvency has not been proved. It was the duty of the sheriff to sell whatever interest the respondent had in the land.

Moule—The act of insolvency is failure to satisfy the judgment debt. The respondent says he will not pay, and merely mentions a piece of land which is not in his name and which the sheriff could not sell. If the sheriff had searched the register in order to advertise the land for sale he could have found nothing, because the land was in the name of a person unknown to him. It was the duty of the debtor to give particulars of the land. Under the former Act, 5 Vict., No. 17, sec. 5, the act of insolvency was failing to satisfy or point out land or property sufficient to satisfy the debt. The present Act makes the "failure to satisfy" the act of insolvency. The mere statement that the debtor has a piece of land not in his name is not sufficient to put the sheriff upon inquiry. (Counsel referred to *In re Sloss (k)*.) In the case of *In re Douglas* it was held that the sheriff's officer was under no obligation to sell the interest of the debtor in mortgaged property, and therefore there should be no obligation to sell the debtor's interest in lands which are in the name of someone else. He had power to sell, but it would be im-

(h) [1880] 6 V.L.R. (I.) 50.

(i) [1886] 12 V.L.R. 265.

(k) [1893] 19 V.L.R., p. 713.

possible to advertise for sale land which was in the name of a person unknown, the nature of the interest not being revealed and the amount of land being also unknown. If there has been any mistake the fault is that of a public officer, and no costs should be given : *In re White* (l); *In re Fenner* (m).

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WILLIAMS, J. I may state that I accept the evidence of the respondent, but I will reserve the question of law depending upon such evidence.

Cur. adv. vult.

WILLIAMS, J. This was an order *nisi* for the sequestration of the estate of G. A. Rylah. It was opposed by the respondent, and certain objections were filed with a view of going behind the judgment of the Supreme Court upon which the petition was founded. It was contended that the respondent was entitled to go behind that judgment for the purpose of showing that the debt which was represented by it was not a debt of the respondent, but was a partnership debt of the respondent and the petitioning creditor; in other words, that they were carrying on business in partnership together, and that this debt for which judgment was signed was a partnership debt. Certain English cases were relied upon: *Ex parte Kibble* (n), and *ex parte Lennox* (o). Those cases certainly would appear to decide that for certain purposes you may go behind a judgment debt—for instance, you may go behind the judgment to show that there is no debt. Under our Act I have no doubt you may go behind the judgment to show collusion or fraud or something of that kind between the debtor and petitioning creditor. There is no doubt that these cases support the respondent's position to a great extent, but I had this difficulty, that our Act is not the same as the English Act under which those decisions were given. There are also three decisions of this Court—namely, *In re Morris*, *In re Monks*, and *In re Lee*—which are clear upon the point that in proceedings of this kind the insolvent is not allowed to go behind the judgment, and inasmuch as we

(l) 6 V.L.R. (I.) 50.

(n) L.R. 10 Ch. 373.

(m) [1887] 7 V.L.R. (I.) 13.

(o) 16 Q.B.D. 315

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are administering our own Act, I prefer to follow the decisions of our own Court. I still think it would be open to the insolvent to go behind the judgment to show that the judgment is the result of collusion, but I am not prepared to go beyond that at present. It may be possible that he would be allowed to show there was no debt, but here it was desired to go behind the judgment to show that this was a partnership debt; and, subject to any contrary doctrine that may be laid down by the English cases, I am clearly of opinion that upon the authorities of this Court that is not permissible.

The only question that remains is whether there is a good act of insolvency proved. The petition is founded upon sub-sec. (viii.) of sec. 37 of the *Insolvency Act* 1890. (His Honor read the sub-section.) That ground is set out in the order *nisi* following the petition, and the question is whether that act of insolvency has been established. There was a conflict of testimony as to what passed between the respondent and the sheriff's officers, but as I stated during the argument and after the evidence was closed, I am prepared to accept the version of the respondent. I think it is supported by other facts. He said that the sheriff's officer called upon him to pay, and that he said, "I cannot pay, but I have land at Benambra which you can levy on if you please." One of the officers said "Is it encumbered?" and I said "No." In cross-examination he said he had land at Benambra, that he told the sheriff's officers so; and in re-examination he produced the deeds and explained how he bought them; he had the deeds still in his possession, and said the lands were of substantial value. Now, that being so, as I accept his version, there is no doubt that this return is not correct. (His Honor read the return.) I think that to make that act of insolvency a good one the return must be true in fact. I cannot find that this point was ever decided before, but I think that that is the proper view. To make such an act of insolvency good the return must be true and must not be a false return. In the view I take of the evidence this was a false return, because, at any rate as to part of the money mentioned in the writ, there was some real estate

out of which it could have been satisfied. There are two cases which touch this point but are distinguishable. In *In re Douglas* (p) a question as to mortgaged property was raised, and that distinguishes it from the present case, as the property was not mortgaged here. The other case of *In re White* (q) is distinguishable, because the return there was clearly bad; here it is false. On that ground I think the order *nisi* should be discharged, but, following the authorities as to costs to which I was referred, it will be discharged without costs.

Order nisi discharged, without costs.

Solicitors for petitioning creditor: *Moule, Hamilton & Kiddle.*

Solicitor for respondent: *Parkinson.*

W. H. M.

[PRACTICE COURT.]

POWELL (INFORMANT) v. KIERULF.

The Factories and Shops Acts 1890, 54 Vict. (No. 1091), s. 46, Schedule IV.; 1896, 60 Vict. (No. 1445), 3 (b); 1898, 62 Vict. (No. 1597), ss. 2, 7, 9—Shop—"Closed"—Hairdresser—By-law—Validity—Admission.

The defendant, a hairdresser, was charged upon information with a breach of the *Factories and Shops Act 1890* for that not being licensed to keep open after 7 o'clock in the evening he did not close his shop from that hour. At the hearing before a court of petty sessions the prosecuting solicitor admitted the existence and operation of a by-law allowing hairdressers to keep open until 8 p.m. The justices convicted the defendant for not having closed his shop at 7 o'clock.

Held, that the conviction was bad.

Semble, per WILLIAMS, J. The validity of a by-law cannot be attacked in such a proceeding, or upon an order to review it, by reason of the provisions of sec. 9 of the *Factories and Shops Act 1898*.

Semble, per WILLIAMS, J. Where the time for closing his shop is fixed a hairdresser may not after that hour commence to shave or dress the hair of a customer.

Ellis v. Horsley (23 V.L.R. 609) distinguished.

ORDER TO REVIEW.

On 12th April 1899, at the Court of Petty Sessions, Richmond, William Melbourne Kierulf, carrying on business as a hairdresser and tobacconist at 84 Bridge-road, Richmond, was

(p) 12 V.L.R. 265.

(q) 6 V.L.R. (I.) 50.

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finer 1s., with 1l. 1s. costs, "for that defendant on Thursday 23rd March 1899 in the city of Richmond being occupier of a certain shop did not close the said shop from the hour of 7 o'clock in the evening of the said day." An order *nisi* to review this decision was obtained on the ground that there was no evidence before the justices that the defendant was guilty of the offence charged. It appeared from the affidavit of the defendant's solicitor upon which the order *nisi* was granted that on the hearing the solicitor for the prosecution, in opening the case, stated that there was a by-law passed in 1896 which, though *ultra vires* by reason of the fact that at that time a hairdressing saloon was not a shop within the meaning of the *Factories and Shops Act*, was recognized by the department, and no prosecution would have been instituted if 8 o'clock had been observed by defendant, but that he had been found working at 9 p.m. He pointed out that, the by-law being *ultra vires*, the defendant had to be charged with not closing at 7 p.m. Evidence was given that at 9.15 p.m. on the 23rd March 1899 he was shaving a man. The defendant in his evidence stated that at 8 p.m. he locked the door of his shaving saloon and that the customers came in before 8 p.m. He said that he thought he had a right to finish off these persons. The solicitor for the prosecution admitted the by-law. At the close of the evidence the solicitor for the defendant objected that no proof had been given of the closing of the shop within the meaning of sec. 7 (a) of Act No. 1597. There was no dispute as

(a) *Factories and Shops Act* 1898 :—

"Sec. 2. Section three of the Principal Act is hereby amended as follows :—

"(a) The definition of the expression 'closed' with reference to shops is hereby repealed."

"Sec. 7. It shall be deemed that a shop was not closed within the meaning of the *Factories and Shops Acts* if it be proved with reference to such shop that—

"(a) Goods were sold ; or

"(b) Goods were offered for sale ; or

"(c) Goods were exposed for sale.

"Sec. 9. (1) If any person desires to dispute the validity of any regulation

or by-law made or purporting to have been made under any of the provisions of the *Factories and Shops Acts* or any Act repealed thereby it shall be lawful for such person to apply to the Supreme Court upon affidavit for a rule calling upon the Chief Inspector of Factories in the case of a regulation or on the municipal council making such by-law (as the case may be) to show cause why such regulation or by-law should not be quashed either wholly or in part for the illegality thereof and the said Court may make the said rule absolute or discharge it with or without costs as to the Court shall seem meet.

"(2) Every such regulation or by-

to the facts stated by the defendant's solicitor, and no answering affidavit was filed by Thomas Jasper Powell, the informant, an inspector of factories and shops.

Cussen to move the order absolute.

J. E. Mackey to show cause—The evidence shows that defendant closed his shop at 8 o'clock in the evening, but continued until 9 p.m. to work in the shop shaving and cutting the hair of customers who entered before 8 p.m. The by-law was not proved; that must be done before sec. 9 of Act 1597 applies. It is not in evidence. By Act No. 1445, sec. 3, sub-sec. (b), the definition of shops was extended to the rooms of hairdressers. The definition of "closed" in sec. 7 of Act No. 1597 is not exhaustive. The informant is not bound by the admission of the by-law's existence: *Regina v. Bertrand* (b).

Cussen in reply—The prosecuting solicitor admitted the by-law: *O'Connor v. Ridout* (c). It is not admitted that it was *ultra vires*. A hairdresser's shop may be a shop, and it is common knowledge that goods are often exposed for sale in hairdressers' shops. Sec. 9 of Act No. 1597 was passed to prevent what the informant is now trying to do. The provision was put in by reason of the decision in *Gomm v. Bennett* (d). Except in the case of *Ellis v. Horsley* (e) every by-law is taken to be valid unless attacked. The facts show that the shop was closed at 8 p.m. No one was allowed in after that hour. The principle that an admission cannot be made in a criminal case has only been recognized when it is made by a prisoner.

Counsel referred to *Rider v. Phillips* (f); *Ellis v. Horsley* (g).

law shall unless and until so quashed have and be deemed and taken to have the like force validity and effect as if such regulation or by-law had been enacted in the *Factories and Shops Acts* or in any Act repealed thereby and shall not be in any manner liable to be challenged or disputed but any such regulation or by-law may be altered or

revoked by any subsequent regulation or by-law under the *Factories and Shops Acts*."

(b) [1867] L.R. 1 P.C. 520.

(c) [1893] 19 V.L.R. 102, at p. 104.

(d) [1895] 21 V.L.R. 608.

(e) [1898] 23 V.L.R. 609.

(f) [1884] 10 V.L.R. (L.) 147.

(g) 23 V.L.R. 609, at p. 626.

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WILLIAMS, J. This is a prosecution under the provisions of the *Factories and Shops Act* 1890 against one William Melbourne Kierulf, hairdresser, for not closing his shop *from the hour* of 7 o'clock in the evening of a certain date—[the words in the Act are “at the hour of seven”]—he not being licensed to remain open at night under any by-law. The magistrates convicted the defendant. (His Honor read the conviction.)

An order *nisi* to review this decision was obtained by the defendant on the ground that there was no evidence before the justices that the defendant was guilty of the offence charged. Now, the “offence charged” was that he, not being licensed to keep his shop open after 7 o'clock in the evening, did not close it at that hour—that is, substantially, the offence charged. The prosecution in opening the case stated that a by-law was in existence by which hairdressers might be allowed to remain open until 8 o'clock in the evening, and that that by-law was one which the authorities had always recognized, and that if the defendant had closed at 8 p.m. no notice would have been taken of the matter, and no complaint made against him for a breach of the provisions of the Act in closing at that hour. It appears that a few days before the commission of the alleged offence two constables of police waited upon the defendant and told him that he would have for the future to close his saloon at 8 p.m., so that that regulation was put in force—viz., a regulation to close at 8 p.m. That being so, it appears to me that this ground of the order *nisi* is established. The justices have convicted the defendant for not having closed his shop at 7 p.m., and the case for the prosecution shows that the defendant was licensed to keep open his shop until 8 p.m., therefore there was no evidence either of the offence charged or of which the defendant was convicted, for it appears from the informant's own case that he (the defendant) was licensed to keep open his shop until 8. The information says that he was not a person licensed to keep open after 7 p.m., whereas in fact he was. Therefore I think the first ground of the order *nisi* is established.

It is also contended that the validity of the by-law cannot be attacked on these proceedings, or could not on the

proceedings before the justices. It is not necessary for me now to decide that point, but I think it could not. I think sec. 9 (1) and (2) of Act No. 1597 would be an answer to any such contention, and as no such steps as are mentioned in sec. 9 of that Act have been taken the by-law is to be accepted as if enacted in the Act of Parliament itself, and it is not to be "in any manner liable to be challenged or disputed." Whether this is so or not I do not think it lies in the mouth of the counsel for the Crown now to contend before me that this particular hairdresser was not licensed to keep his shop open after 7 p.m. In opening his case in the Court below it was stated by counsel for the Crown that he was. The Crown sent its officers to warn the defendant for the future to close at 8 o'clock p.m. It stated it always recognized this by-law as a valid and subsisting by-law. In the view of the case which I have taken it is unnecessary to decide the other point. Suppose the information had stated that this man was licensed to remain open until 8, and was for an offence of that description, then I think on these facts it would be difficult to decide that the defendant closed his shop at 8 o'clock p.m. within the meaning of the Act and by-law. I can quite understand the following case being treated as no breach of the Act, where a man closed his shop at 8, but had begun to shave or dress the hair of a person before that hour, and was simply finishing him off afterwards; such state of things might well be considered as no breach, but where a hairdresser commences to operate upon a new customer after 8, in such a case I should feel difficulty in deciding that there was no breach, and if I had now to decide the point I should, I think, be against the defendant's contention, because the evidence is that this man commenced to operate upon customers after 8 p.m. He began fresh business after 8. It is not, as I said, necessary for me now to offer a positive opinion upon the point. Nevertheless, in my opinion it would be a breach of the Act and of the by-law if the defendant went on taking fresh business and operating on fresh customers after 8 p.m. The other instance to which I have referred might not be a breach of the Act and by-law—that is to say, where a man began to operate

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upon a customer before 8 and finished after that hour. Beyond doing this, he ought not, in my opinion, to go.

The order *nisi* will be made absolute, on the ground that there is no evidence upon which the justices should have convicted the defendant of the offence charged—that is, of the offence that he, not being a person licensed to keep his shop open at a later hour, did not close it at 7 p.m.

I cannot help thinking that the justices decided this case upon the ground that this man was commencing fresh work after 8 o'clock, and I think they would have been right if the information had covered that offence.

The point upon which this order is discharged is really a surprise. It was stated that the evidence was directed to an offence committed after 8 p.m., and therefore it is not fair to direct it to one committed after 7 p.m. I therefore give no costs.

Order absolute, without costs.

Solicitor for informant : *Guinness*, Crown Solicitor.

Solicitors for defendant : *Fink, Best & Hall*.

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[PRACTICE COURT.]

MARTIN (INFORMANT) v. O'SULLIVAN.

Practice—Order to review—Evidence—Conflict—Facts—Costs of adjournment—Justices Act 1890 (No. 1105), ss. 146, 148.

Upon the hearing of an order to review the Court will, where there is a direct conflict of fact, accept the version of the party who supports the magistrates' decision.

Whether the Court will under any circumstances accept evidence contradicting the magistrates' affidavit, *quære*.

ORDER TO REVIEW.

Frank John Martin, an inspector for the Borough of Kew under the *Health Act* 1890, proceeded, at the Kew Court of Petty Sessions on 22nd March 1899, by way of information, against Mrs. John Thomas O'Sullivan for breach of the provisions of a by-law made under the amending *Public Health Act* 1887. No evidence was given for the defence. The justices dismissed the case.

An order *nisi* to review the decision was obtained on the ground that upon the evidence the defendant ought to have been convicted. The informant's affidavit in support of the order alleged that evidence was given by him, that the defendant admitted the offence, and that the chairman of the bench stated the bench were unanimous that the case had been proved; but a mistake having been made, and the wrong party having been summoned, the case would be dismissed without costs. Upon the return of the order *nisi* affidavits were filed by defendant and by others on her behalf, denying the evidence of the admission and that the chairman of the bench had said that the bench were unanimous that the case had been proved, and stating that the justices unanimously found the charge had not been proved. An affidavit was made by the chairman of the bench, on behalf of himself and his two colleagues, contradicting the informant's statement that the bench were unanimous that the case had been proved. He stated—"What I did state was 'The bench do not consider the case has been proven; they consider the wrong person has been summoned. The case will be dismissed without costs.'" The informant filed further affidavits by persons present in court at the hearing of the information, contradicting the statements of the chairman of the bench upon these points.

On 3rd May 1899 the hearing of the order *nisi* was adjourned, costs to be costs in the cause.

A. H. Davis to move the order absolute.

Bryant to show cause—The answering affidavits will not be allowed. The practice is settled. These affidavits are in direct conflict with that of the chairman of the bench.

Davis in reply—The Court is put upon inquiry by the contradictory nature of the affidavits filed in this case.

[WILLIAMS, J. The Court will not go into the matter where the evidence conflicts.]

Under the *Justices Act* 1890, sec. 146, the Court may receive fresh evidence. As to the chairman's affidavit, the further evidence is admissible, to show that the justices were in error.

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WILLIAMS, J. I think the bench were right in their conclusion upon the evidence apart from the defendant's alleged admission. I think they came to the right conclusion.

As to the conflict of evidence, I always accept the version of the person in support of the decision in the Court below. This was the practice upon the hearing of orders *nisi* for prohibition under Act No. 571. The practice is clear and well established. The facts as stated by the affidavit in support of the order *nisi* are contradicted. I accept the facts in the affidavits of the person showing cause. If he is wrong he can be prosecuted for perjury. This has been my invariable practice for eighteen years, and I have not yet been overruled by the Full Court. Upon these orders *nisi* to review where the ground is taken that the justices ought to have convicted—as in this case—where there is a dispute as to the facts given in evidence in the Court below between the applicant for the order and the party showing cause, that is to say, as to what took place before the justices and as to the grounds of the justices' decision—I have always accepted the version set forth in his affidavit by the party showing cause, for the purpose of considering whether I should discharge the order. I do not go into the question who is right or who is wrong. I have often stated in reference to these orders *nisi* that the affidavit filed in answer to the applicant for the order often destroys the latter's case by contradicting the facts upon which the order *nisi* is obtained.

The order *nisi* will be discharged, with costs.

Bryant—As the costs of this hearing may not exceed 20l.—*Justices Act* 1890, sec. 148—I ask for an order that the costs of the adjourned hearing be not included in the costs of this hearing. They were made costs in the cause.

WILLIAMS, J. I shall make no order as to the costs of the adjournment.

Order discharged.

Solicitors for informant: *Madden & Butler.*

Solicitors for defendant: *Westley & Dale.*

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WALLACE v. WALLACE.

Trustee—Next friend of infant plaintiff—Staying proceedings until infant 21—Inquiry as to whether action for benefit of infant—Will, construction—Forfeiture clause on bringing action—Trustee and cestui que trust—Breach of trust—Frivolous and vexatious action—Reasonable and bond fide action—Costs.

A testator by his will devised and bequeathed the residue of his real and personal property to trustees upon trust for sale and conversion, with a discretion to postpone the sale and conversion as long as they should think fit, and let his real estate, and upon trust to invest the proceeds upon Government stocks or debentures or first mortgage of freehold estate and to stand possessed thereof in trust for all the children of his daughter Teresa Wallace who before or after her decease should attain the age of 21 years, in equal shares, and he empowered his trustees to apply the yearly income of any minor's presumptive share towards his maintenance, &c. ; and he provided as follows :—"I declare that any and every person and persons entitled to any benefit under this my will whether presumptively or absolutely who shall take any proceedings either at law or in equity against my executors or trustees for the time being or shall institute any suit in any Court of competent jurisdiction for the administration of my estate shall absolutely forfeit all benefit to which he she or they shall be entitled under my will and the same shall belong and be paid to the treasurer of the Melbourne Hospital for the benefit of that institution."

An action was brought by an infant son of the testator's daughter by his next friend against his father, who was the sole surviving trustee of the will, and the other children of the testator's said daughter and the Melbourne Hospital, alleging many breaches of trust, and amongst others that the defendant trustee had taken moneys of the trust estate as loans or advances to himself without proper security, that he had expended large sums of the estate moneys in the purchase of mining and bank shares, in lending moneys to individuals without security, that he had placed moneys of the estate upon deposit in banks, and that he claimed as his own and had retained for his own use the income of properties which belonged to the trust estate.

On motion by the defendant trustee to stay the action until the plaintiff came of age, or refer it to the Chief Clerk to ascertain whether it was for the infant's benefit to bring the action, having regard to the forfeiture clause, it was shown that the action had been threatened by the adult sons of the testator's daughter, who were defendants ; but that, acting under counsel's advice, the action had been, with his consent, brought in his name in order to evade or avoid the forfeiture clause.

Held by HOLROYD, J., that the motion should be dismissed, with costs.

At the trial counsel for the Melbourne Hospital, a defendant in the action, proposed to cross-examine a witness for the plaintiff to show that the action was really that of the adult sons, that he might raise the question whether they also had forfeited their interests.

Held by MADDEN, C.J., that no case between the Melbourne Hospital and the adult sons could be raised in this action.

But held, that any of the beneficiaries who were adult were entitled to argue upon the question of the construction of the will as to the forfeiture clause affecting the plaintiff's interest.

Held, that though the forfeiture clause might apply to a frivolous or vexatious

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action brought against the trustee, it did not apply to an action *bond fide* and reasonable such as the present.

Observations on how far forfeiture clauses in wills can be valid.

Where, after the defendant's evidence is closed, a witness is recalled for the plaintiff by permission of the Court, and asked a question which the Court disallows as irrelevant, and is not further examined for the plaintiff, he may be cross-examined by the defendant on the case generally.

Held, that the costs arising out of the question of law raised by the forfeiture clause, as well as the costs of showing that the action was reasonable and *bond fide*, being due to the will of the testator, should come out of the estate; that the defendant trustee should pay to the plaintiff the costs of the issues of breach of trust on which he had succeeded, and to the other beneficiaries who were defendants one set of costs.

ACTION by Peter Brown Wallace, an infant beneficiary under the will of the late Thomas Monahan, by Frederic Godfrey Hughes, his next friend, against John Alston Wallace, who was the surviving executor and trustee of the will, the other beneficiaries under the will, namely, William James Wallace, Charles Dunkley Wallace, John Alston Wallace the younger, Teresa Ellen Monahan Wallace, Elizabeth Mary Keogh (otherwise called Bessie Maria Keogh), William Monahan Keogh, Mary Alice Tobin, Maude Alice Tobin, Bessie Alice Tobin, Florence Maude Keogh, and the Melbourne Hospital, for relief in respect of various alleged breaches of trust by the trustee in the execution of the trusts of the will.

By his will, dated 3rd March 1876, Thomas Monahan appointed the defendant John Alston Wallace and one Moses Fraser to be trustees and executors of his will, and gave his wife Mary Monahan certain chattels and an annuity, and a life interest in certain real estate, and bequeathed to his trustees an annuity of 200*l.* per annum in trust for his daughter Elizabeth, the wife of Denis Patrick Keogh, during her life, and a sum of 40,000*l.* to be invested and held by his trustees on certain trusts for such of the children of such daughter, viz., Thomas Keogh, William Keogh, Mary Keogh, and Maude Keogh, as being males attained 25 years and being females should attain 21 years or marry, in equal shares, and he strictly settled the share of each of such granddaughters upon her for life, remainder to her children who should attain 21 years of age or marry; and he devised all his real estate, subject as aforesaid, and all the

residue of his personal estate to his trustees upon certain trusts for sale, conversion, and getting in, and on trust out of the proceeds to pay duty, debts, and expenses and the legacies and annuities aforesaid, and authorized his trustees to appropriate and invest in their names sufficient funds to answer by the income thereof the payment of the said annuities, and directed that such funds should, on the dropping of the respective annuities, follow the destination of the residue of his real and personal estate. And, subject to the trusts aforesaid, he directed that his trustees should hold such property or proceeds as aforesaid on trust, to invest the same in the names of his trustees in Government stocks or debentures of the colonies of Victoria or of New South Wales, or on first mortgages of freehold estates in Victoria; and on further trust to pay the income of such residuary real and personal estate to his daughter Teresa Wallace, the wife of the said John Alston Wallace, during her life; and as to the whole of the *corpus* of his residuary real and personal estate, and the income to accrue therefrom after the death of the said Teresa Wallace, he directed his trustees to stand possessed thereof in trust for all the children of the said Teresa Wallace who before or after her decease should attain the age of 21, or being a daughter or daughters be married, in equal shares. And he empowered his trustees "to apply all or any part of the yearly income arising from any minor's presumptive share under my will after the death of the preceding owner for life thereof (if any) towards the maintenance and education or otherwise for the benefit of such minor during his or her minority or at the option of my said trustees to pay the same into the hands of the parent or guardian of such minor to be so applied and notwithstanding that the father may be living and able to provide such maintenance and education, and the unapplied income shall be accumulated and invested pursuant to the trust for investment lastly hereinbefore contained." And the said will also contained a declaration in the words following—"I declare that any and every person and persons entitled to any benefit under this my will whether presumptively or absolutely who shall take any proceedings either at law or in equity against my

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executors or trustees for the time being or shall institute any suit in any court of competent jurisdiction for the administration of my estate shall absolutely forfeit all benefit to which he she or they shall be entitled under my will and the same shall belong to and be paid to the treasurer of the Melbourne Hospital for the benefit of that institution."

By a codicil dated 25th October 1878 the testator revoked the appointment of the said Moses Fraser to be an executor and trustee of his will, and appointed his wife to be executrix and a trustee in his place, but in all other respects confirmed his will. The testator died on the 25th day of May 1889, and probate of his will and codicil in Victoria was granted on the 1st day of August 1889 to the defendant John Alston Wallace, as sole surviving executor. The testator's wife, Mary Monahan, and his daughter Teresa Wallace, both died before the testator. The real and personal estate of the testator in Victoria was at his death of very great value, amounting to nearly one million pounds sterling, and the testator had also at his death real and personal estate in the colony of New South Wales of considerable value, and about 20,000*l.* secured on mortgage of property in the colony of Queensland. His debts at the time of his death did not exceed seven hundred pounds. The only children of the testator's daughter Teresa Wallace, and the only persons entitled to share in the testator's residuary estate under his will, were her five sons, namely, Thomas Monahan Wallace and the defendants William James Wallace, Charles Dunkley Wallace and John Alston Wallace the younger and the plaintiff Peter Brown Wallace, and her daughter the defendant Teresa Ellen Monahan Wallace. Thomas Monahan Wallace attained the age of 21 years, and on the 31st day of January 1893 died intestate and without having been married. The defendants William James Wallace, Charles Dunkley Wallace, and John Alston Wallace the younger had attained the age of 21 years; but the plaintiff and the defendant Teresa Ellen Monahan Wallace were under the age of 21 years and unmarried. The defendant Elizabeth Mary Keogh, otherwise called Bessie Maria Keogh, was the testator's daughter described in his will as Elizabeth the wife of Denis Patrick Keogh. The

defendant William Monahan Keogh and the defendant Florence Maude Keogh, who was unmarried, were her children, in such will called William Keogh and Maude Keogh respectively. The defendant Mary Alice Tobin (formerly Keogh) was her daughter, in such will called Mary Keogh; and the defendants Maude Alice Tobin and Bessie Alice Tobin were the only children of the defendant Mary Alice Tobin. Thomas Keogh survived the testator, and attained the age of 25 years, but had since died, and there was no existing legal representative of his estate.

"The will had never been proved in New South Wales, and no application for such purpose had ever been made by the defendant John Alston Wallace or by any other person. No new trustee of the will had ever been appointed.

"The statement of claim alleged that upon the death of the testator the defendant John Alston Wallace took possession and control of the testator's assets in Victoria, New South Wales, and Queensland, and had dealt with the same in breach of his duty as such executor and trustee, and had violated or disregarded the trusts of the said will, and had been guilty of the following breaches of trusts and neglects of duty as such executor and trustee:—

"He had expended large amounts of the trust estate in the purchase of shares in banking and other companies and in mining companies, and the greater portion of such amounts had been lost. In particular he expended 23760*l.* in purchasing shares in the Standard Bank, the whole of which sum had been lost, and over 16000*l.* in purchasing shares in mining companies.

"He had invested portions of the trust estate, amounting to about 5000*l.*, on deposit with the City of Melbourne and Standard Banks, and the whole amount thereof had been lost.

"He had applied portions of the trust estate in payment of interest on moneys alleged to have been borrowed by him, though no such borrowings were required or justifiable for any proper purposes of the trust, such as 7483*l.* paid to the National Bank of Australasia as for interest on an overdraft, and 583*l.* 18*s.* 5*d.* paid to Mrs. Rennick as for interest on money deposited by her with him.

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"He had lent large amounts out of the trust estate to various persons and companies, either on personal security merely or on wholly unauthorized securities, and the greater portion thereof had been or would be lost. The sums so lent and still owing amount to more than 40000*l.*, and 7000*l.* of this sum was lent to one Julius Evinoff on merely personal security.

"He had expended over 40000*l.* of the trust estate in purchasing additional lands and in buildings or improvements in connection with part of the trust estate in New South Wales known as Quat Quatta station.

"He had retained unsold the whole of the testator's real estate, and spent large amounts of the trust estate in new and unnecessary buildings upon portions thereof. In particular he had with the trust moneys built the building called 'Monahan's Buildings' at the cost of over 40000*l.*, and the building called 'Quat Quatta House,' at St. Kilda, at a cost of over 15000*l.*, where he himself resided and for which he had paid no rent.

"He had taken moneys from the trust estate as loans or advances to himself and without giving any proper security therefor.

"He had received, and had not accounted for, and had retained for his own use moneys derived from the trust estate, and in particular from the Quat Quatta station.

"He had invested large portions of the trust estate on mortgage securities of insufficient value, and without taking due care or precautions, and great loss had been occasioned thereby. In particular he lent over 44000*l.* to the Brunswick Gas and Coke Company on the security of works and machinery and trading plant as well as of real estate of wholly insufficient value, more than 44000*l.* of which was still owing and could not be recovered. Over 116000*l.* of trust moneys was now represented by foreclosed properties.

"He had affected to purchase for himself from the trust estate, and had since treated as his own property, various shares in mining companies at prices fixed by himself, and at an under value.

"He had been guilty of wilful default in not getting or attempting to get income from portions of the trust estate

from which he could have obtained income, and in particular he had allowed the trust properties respectively occupied by Mrs. Peter Wallace, Mrs. Blair, and Mrs. Merrilies to be occupied by them respectively for long periods and had never received or asked for any rent for any of such properties, and had not got any rent from but had himself occupied and had paid no rent for the said trust property known as Quat Quatta House, in St. Kilda.

“He now claimed to retain as his own property the London Hotel at Port Melbourne, which on obtaining probate he had declared to be part of the trust estate, and on which as executor he paid out of the trust estate duty as on a capital value of 13466*l.*, and he had retained and not accounted for the rents and profits received therefrom since the testator’s death.

“He had kept no proper accounts of the trust estate showing any separate accounts of capital and income respectively, and had kept no account as to the separate share or interest of the plaintiff or of any beneficiary either in capital or income.

“He had at various times refused to recognize any right in any beneficiary to compel payment from such defendant of any portion of such beneficiary’s share or interest, and had threatened to refuse to make any payment to any beneficiary attempting to insist on any payment on account of his share or interest.

“He had never sold or attempted to sell any portion of the testator’s real estate.”

The statement of claim then proceeded as follows :—

“Under the circumstances it is desirable, and in the interests of the plaintiff and all other persons beneficially entitled under the said will, that accounts should be taken and inquiries made by or under the direction of the Court, and that the defendant John Alston Wallace should be removed from his position as trustee, and that new trustees should be appointed.

“The plaintiff claims :—That accounts and inquiries be taken and made as to the dealings of the defendant John Alston Wallace with the said trust estate, with such special declarations and directions as may establish and enforce the liability of such

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defendant to the trust estate in respect of the breaches of trust complained of; that accounts be taken as on the footing of wilful default; that the defendant John Alston Wallace be ordered to pay to the trust estate what may be found due from him as the result of such accounts, inquiries, and directions; that the defendant be removed from his office as trustee of the said will; that a new trustee or trustees of such will be appointed; that it be declared that the testator's will should be proved in New South Wales, and that directions be given proper to cause or enable the same to be done."

By his defence the defendant John Alston Wallace admitted that he had retained unsold the whole of the testator's real estate, but said that he did so in exercise of the discretionary power given to him by the will. He had expended certain amounts of the trust estate in the erection upon the estate of buildings which were necessary to make the estate profitable, and which had in fact resulted in a large gain to the estate. He also alleged that from the testator's death until recently all the children of Teresa Wallace had been residing with and maintained, educated, and supported by him, and some of them were still living with and maintained and supported by him, and by the will he was empowered to apply all or any part of the income of a minor's presumptive share during minority towards his maintenance and education or otherwise for his benefit, notwithstanding that his father might be living and able to provide such maintenance and education; and he would contend that if any accounts and inquiries were ordered provision should be made for allowance to him in respect of such maintenance and education, and for moneys expended for the benefit of the beneficiaries under the will. He denied that he had in breach of trust taken moneys from the trust estate as loans or advances to himself, and without giving any proper security therefor; and he alleged that if he advanced or lent to himself any such moneys they were amply secured, and he had in addition always been ready and willing to allow the share of the estate to which he was entitled under the *Statute of Distributions* as father and next of kin of Thomas Monahan Wallace, deceased, and also the Quat Quatta

property in New South Wales, to stand as security or be applied in payment of any such loans or advances as far as might be necessary. He alleged that the Quat Quatta property in New South Wales did not and never did form part of the trust estate, but was at the time of the testator's death and now his own property. He admitted that he had invested portions of the trust estate on mortgage securities, and that some of such mortgage securities had been foreclosed. He admitted that he had purchased various mining shares for the trust estate with its moneys, and he intended that they should be treated as part of the estate, but alleged that upon objection being made to such purchase by the plaintiff he had taken over the shares on his own behalf and recouped the estate in cash the amounts expended on their purchase. He alleged that the London Hotel, at Port Melbourne, did not, and never did, form part of the trust estate, but was at the testator's death and now his own property, and admitted that he had retained the rents and profits received therefrom. In all other material respects he denied the allegations made in the statement of claim. He by his defence further objected that if the allegations in the statement of claim were true the plaintiff had no cause of action against him, as the gift to the plaintiff by the will was contingent upon his attaining 21 years, and the will provided that if any person entitled to any benefit under it, whether presumptively or absolutely, should take any proceedings at law or in equity against the executors or trustees thereof, or should institute any suit in any court of competent jurisdiction for the administration of the testator's estate he should absolutely forfeit all benefit to which he would be entitled under the will and the same should belong to and be paid to the treasurer of the Melbourne Hospital, for the benefit of that institution, and he objected that by reason of the plaintiff's bringing this action and the forfeiture clause in the will the plaintiff had forfeited his benefit under the will, and had now no interest in the trust estate and was therefore unable to maintain this action, and that his interest had passed to the Melbourne Hospital, or that in any event the action should be stayed until the plaintiff attained the age of 21 years.

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The other defendants by their defences submitted their interests under the questions of law raised by the plaintiff to the judgment of the Court.

The action in the first instance had been brought without making the Melbourne Hospital a party, but on the objection taken by the defendant John Alston Wallace by his defence that it was a necessary party, it was added by the plaintiff as a party and the pleadings amended.

The defendant John Alston Wallace after the close of the amended pleadings made a motion that the action should be stayed until the plaintiff came of age, or should be dismissed on the ground that it was not the plaintiff's action, but that of a next friend who was induced to bring the action by the defendants Charles Dunkley Wallace and John Alston Wallace the younger in order to evade the forfeiture clause as to their own shares.

Affidavits were filed on behalf of the defendant John Alston Wallace tending to show that the plaintiff had not authorized the action to be brought, and did not desire that it should continue. Affidavits were filed on the plaintiff's behalf showing that the defendants Charles Dunkley Wallace, John Alston Wallace the younger, and the plaintiff all desired to bring the action and to continue it, but that acting under legal advice the action had for greater safety been brought on the plaintiff's behalf, as he was an infant.

This motion came on before Holroyd, J.

Topp and *Hayes* in support of the motion—The plaintiff's interest is but a contingent interest.

[HOLROYD, J. Suppose any of the breaches of trust charged are true, is not the infant's interest directly concerned? It would be impossible to say that it was not.]

The infant is only entitled when he comes of age, and the affidavits show that he does not at present desire to continue this action, and that he did not want it brought.

[HOLROYD, J. Until he comes of age the opinion of the infant ought not to have much weight with the Court. Neither

would his opinion be entitled to much weight immediately after he came of age. He should be in a position in which he could render an independent judgment. I know that naturally a son may be affected by his father's judgment, and, in my humble opinion, it is a very excellent thing that it should be so. But when these matters come before the Court it has to exercise a duty apart from all sentiment, and say whether it is for the benefit of the infant that the action should be brought, that benefit being simply the pecuniary benefit.]

While that is so, it is submitted that the Court will not countenance a dummy action brought by a stranger.

[HOLROYD, J. Suppose that Mr. Charles Dunkley Wallace is actuated by his own interest only; but, at the same time, when I come to read the will, I see that the pecuniary interest of Mr. Charles Dunkley Wallace and of the infant plaintiff are absolutely the same, and I see, as I do by these affidavits, that the other two sons, who are of age, are also of the same opinion; and then, when I look at the charges themselves, I see that several are of great importance, and some are not denied. Can I then say that the action should not proceed? Ought not I to conclude that the action is for the pecuniary benefit of the plaintiff?]

The adult sons set up the infant to take the risk they were afraid themselves to take.

[HOLROYD, J. Suppose they see the estate which belongs to them being wasted, and they see that if the clause in the will is a good one they imperil their own shares, and they find that they can without risk bring the action in the name of their infant brother, why should not they do so?]

They really bring the action and thereby lose their interests. They are permitted to bring an action which the testator intended should not be brought.

[HOLROYD, J. I can hardly imagine that the testator's meaning was that if an executor was putting the estate into his own pocket (and that is part of what is alleged), his beneficiaries should have no remedy—that that should be put up with. That that was his meaning is to me inconceivable.]

There is nothing against public policy in it. It is easy to

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allege grave matters and then say the action ought to go on. It is submitted that the evidence shows that the action is really brought by the next friend for the benefit of the two adult sons who are defendants, and that the next friend is not therefore a proper person to bring the action for the infant plaintiff, and that either the action should be now stayed until the plaintiff is 21 years of age, or else that there should be an inquiry as to whether the action is for the infant's benefit: *Simpson on Infants* (2nd ed.), 471, etc.

[HOLROYD, J. The Court would have power to direct an inquiry whether the plaintiff's next friend was a substantial person, but what impresses me is that I see no reason at this stage of the proceedings to stop them. If you have made a case, I may direct an inquiry whether the next friend is a substantial person, but I will not now decide it. In all these cases is not the Court to look to the infant's benefit? If it thinks it is for the infant's benefit that the action shall be stayed while it is being ascertained whether the action is instituted for the infant's benefit or not, the Court will stay the proceedings, otherwise not.]

When a party comes to this Court as next friend of an infant he must show that he really acts for the infant's benefit, and not for his own or those for whom he is a dummy: *Sale v. Sale* (a). The Court is not bound to accept anyone as next friend of an infant plaintiff. The natural next friend is the nearest relative, but he must not be a person who is interested with a defendant, *a fortiori* if he is really a defendant: *Eversley on Domestic Relations*, 895.

Higgins and Weigall for the plaintiff—The motion is made too late. It ought to have been made as soon as the writ was issued, or, at all events, before taking an objection by the defence that the hospital was a necessary party, and so causing unnecessary expense to all parties. The affidavits show that great care was exercised before commencing the action. The plaintiff's solicitor in his affidavit says that he believes the charges made in the statement of claim are true. They are not

(a) [1839] 1 Beav. 586.

denied by the defendant John Alston Wallace. Before the Court will stay proceedings in a case of this kind it must be established that the next friend had some improper motive in bringing the action, and that it will not be for the benefit of the plaintiff. In the absence of any fact impeaching the solvency, conduct, or character of the next friend, though he be a stranger to the family, the Court should not refer it to the Master to inquire whether he is a proper person to be next friend: *Smallwood v. Rulter* (b); *Nalder v. Hawkins* (c).

[HOLROYD, J. Are all the other defendants of the same opinion?]

Mitchell and *McDougall* for the defendants William James Wallace, Charles Dunkley Wallace, and John Alston Wallace the younger,

Goldsmith and *Wanliss* for the defendant Teresa Ellen Monahan Wallace,

Schutt for all the other defendants, except the Melbourne Hospital,

Agg for the Melbourne Hospital, assented.

HOLROYD, J. I think I ought to dismiss this motion, with costs.

* 2 The case now came on for hearing.

Higgins and *Weigall* for the plaintiff—The defendant John Alston Wallace committed the various breaches of trust alleged in the statement of claim. We do not suggest that he was dishonest, but we say that he was a masterful man, who thought that his children's interests were his own, would brook no interference by his children, would not give them what they were entitled to under the will, and who treated the property as his own, doled out small amounts only of the income of adult beneficiaries, and, when they claimed their rights under the will, threatened them with the forfeiture clause in the will. We

(b) [1851] 9 Hare 24.

(c) [1833] 2 My. & K., pp. 249, 250.

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therefore say that he is not a fit person to remain as trustee of the will. We ask for a judgment declaring the various acts complained of in the statement of claim to have been breaches of trust, and directing the Chief Clerk to inquire the value of the assets of the estate, so as to ascertain the amount of the loss on each breach of trust, for an account on the footing of wilful default because he has not received rents and interest which he ought to have received, for ordinary administration accounts, and for an order that the will be proved in New South Wales. By this will the testator intended that his property should be held by (in the events which have happened) the defendant John Alston Wallace upon the trusts of his will. The property was not being held upon such trusts, and, it is submitted, any of the beneficiaries were entitled to come to this Court and say so. The action was brought advisedly in the infant's name, because it was thought that the infant was in a stronger position with regard to the forfeiture clause than the adult beneficiaries. It would be against public policy to allow such a clause as this to stand in the way of preventing a trustee squandering the trust estate or putting it in his own pocket. But, at all events, it is repugnant to the trust which the testator has fixed by his will, and therefore void, or was intended to apply only to frivolous and vexatious actions and nagging interference with the trustee in the exercise of his discretion in managing the estate: *Rhodes v. The Muswell Hill Land Company* (d); *Adams v. Adams* (e).

Evidence for the plaintiff was then called.

As part of the plaintiff's case his solicitor, Mr. Thomas C. Alston, was called, and besides giving evidence as to how he came to be employed, and as to the correspondence before action, stated that he had been consulted by the adult sons, and took counsel's opinion, which he produced; that he put such opinion before William James Wallace, Charles Dunkley Wallace, John Alston Wallace the younger, and the plaintiff Peter Brown Wallace, explained the position, counsel's advice, and the effect of the forfeiture clause; that they were unanimous in instructing

(d) [1861] 29 Beav. 560; 30 L.J. Ch. 509. (e) [1890] 45 Ch. D. 426; affirmed on appeal [1892] 1 Ch. 369.

him to go on with the action, and that the infant Peter Brown Wallace should, on the advice of counsel contained in the opinion, be made plaintiff.

After counsel had cross-examined this witness on behalf of the defendant John Alston Wallace, *Mitchell*, for the adult sons, proposed to cross-examine him.

Topp objected that he was in the same interest as the plaintiff, and therefore not entitled to cross-examine the witness, especially after he had done so.

Higgins—It was decided in *Meadway v. Garlick* (f) that a co-defendant has a right to cross-examine.

MADDEN, C.J. Yes, by Mr. Justice Molesworth, and afterwards in some later case. As at present advised I think it is allowable, but if there is anything upon which you would like to re-cross-examine the witness, Mr. Topp, I will give you an opportunity.

After *Mitchell's* cross-examination concluded, counsel for the Melbourne Hospital proposed to cross-examine the witness on certain paragraphs in his affidavit on the motion of the defendant John Alston Wallace to stay the proceedings or refer it to the Chief Clerk to inquire whether it was for the plaintiff's benefit that the action should continue, in order to show that the action was really brought by the defendants Charles Dunkley Wallace and John Alston Wallace the younger.

Higgins objected.

Agg—It shows that the real plaintiffs in this action are Charles Dunkley Wallace and John Alston Wallace the younger. If that is so, I submit that the defendant the Melbourne Hospital is entitled to a declaration that they have forfeited their interests under the will in its favour, provided the forfeiture clause is not against public policy or repugnant and does apply. It is neces-

(f) [1867] 4 W. W. & A'B. (Eq.) 157.

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sary to establish by evidence who is the real plaintiff in the action when considering such a forfeiture clause as this : *Evanturel v. Evanturel* (g) ; *Williamson v. Dyson* (h). In the latter case if Kindersley, V.C., had found that one of the defendants had authorized the suit he would have held his legacy forfeited.

MADDEN, C.J. It is alleged by Mr. Peter Brown Wallace that, by an improper act of the trustee, a portion of the trust fund has been misapplied. He therefore asks that it should be restored. He does not ask that it should be distributed to anybody or to have it determined to what extent any individual is interested. Having so raised the question for the restitution of the trust fund the trustee raises this forfeiture clause to have it determined that the rights of Peter Brown Wallace have been forfeited—that he, having brought this action, has no longer any interest in the estate. That is the question I have to decide. But I consider that the question of whether these other gentlemen have forfeited their interests to the Melbourne Hospital has not arisen yet. I think that as this action is not to administer the estate or to distribute it, and as the forfeiture clause is raised by the defendant John Alston Wallace as a defence to the action, counsel for the Melbourne Hospital cannot in this action raise the question whether the other beneficiaries have forfeited their interests under the will. I am not called upon to deal with, nor can I consider, any questions arising between co-defendants.

After the close of the plaintiff's case,

Topp opened for the defendant John Alston Wallace—It is submitted that the plaintiff has by reason of the forfeiture clause lost his right to bring this action. It is further submitted that the defendant Charles Dunkley Wallace has by the bringing of this action lost his rights under the will. It was a mere subterfuge to put up an infant to bring the action. It is clearly shown that the action is really that of Charles Dunkley Wallace. The testator expressly put

(g) [1874] L.R. 6 P.C., p. 20.

(h) [1862] 10 W.R. 681.

this clause in, in order that Mr. Wallace might be untrammelled in dealing with the estate for the benefit of his children. The provision which is raised in the pleading as a defence is curiously stringent, and if your Honor has any doubt that the plaintiff, who is of an age to exercise a good judgment, has affirmed the action it should be stayed until he comes of age. He is an infant presumptively entitled within the meaning of the clause. The action is one of misinvestment—no dishonesty is suggested. The clause is not against public policy—the beneficiaries under the will are mere volunteers and the testator has a right to affix any conditions upon the recipients of his bounty. He has done so, and has made a good gift over on a breach of the condition. Some cases show that such clauses may be bad if there is no gift over on the forfeiture taking effect. There is no case showing that such a clause is against public policy. The only cases which have been referred to are not authorities showing that the clause in a will like the present is void. In *Rhodes v. Muswell Hill Land Company* (i) the action was not brought against the trustee, but against a third person, a wrongdoer. *Adams v. Adams* (k) was so decided because there was no gift over on breach of the condition. Such a condition attached to a legacy is regarded as *in terrorem* only if there was *probabilis causa litigandi*, unless the legacy be given over on breach of the condition: 2 *Jarm. on Wills* (4th ed.), 58. Effect is given to a condition of forfeiture so long as it is *conditio rei licitae*, if there is a gift over on its breach: *Evanturel v. Evanturel* (l). The question in these cases is, it is submitted, that put by Sir James Colville, giving the judgment of the Judicial Committee of the Privy Council as to one of these clauses, at pages 25 and 26, in these words:—"Impossible, or contrary to good morals, it clearly is not; it is not prohibited by any positive law; the disposition which it is designed to protect is neither contrary to law nor public order, since the testatrix had an absolute power of disposition over her whole estate; and the question is, therefore, reduced to this—viz., Is this clause contrary to public order, because it is designed to prevent the

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(i) 29 Beav. 560.

(k) [1892] 1 Ch. 369.

(l) L.R. 6 P.C. 1.

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doing of that which is against public order to discourage." His Lordship is there dealing with the 760th Article of the Code Civil of Canada, but at pages 29, 30 His Lordship shows that the English law is the same. *In re Allan, Havelock v. Havelock-Allan (m)* is to the same effect.

Agg for the Melbourne Hospital—A testator has power to attach as a condition of accepting his bounty a clause providing that that bounty shall not be given if the proposed legatee should bring an action against his trustees for breach of trust, for pocketing the trust funds, or for any other matter in connection with the administration of the trust estate. The principles, *voluntas testatoris totum est* and *cujus est dare ejus est disponere*, apply to conditions of this sort: *Harvey v. Aston (n)*. But if the condition is not to dispute the testator's will, it will be held to be *in terrorem* only, and not to be really meant by the testator, unless, on a breach of it, he benefits somebody else by making a gift over. There is nothing against public policy in it. It is not repugnant to the gift, because it is only a conditional gift. The words of the clause cover such a case as the present. Proceedings are here taken in equity against his executor and trustee for the time being, and a suit has been instituted in a court of competent jurisdiction for the administration of the trust estate. The statement of claim does not in express terms ask for administration under the direction of the Court, but it asks for all that could be got in such a suit. The action is not to compel the carrying out of the trust by Mr. Wallace—it is for his removal, to prevent him carrying out the trust, and, in addition to the claim in respect of the breaches of trust, it asks for an order, which would apply to the new trustees when appointed, that the will be proved in New South Wales. There is no breach of trust in not proving a will. The authorities cited for the plaintiff do not establish that an action such as this may be brought by a beneficiary expressly prohibited from bringing any action, whose legacy is given over to another on any action being brought, and if they do they are not in accordance with a long line of

(m) [1896] 12 *Times* L.R. 299.(n) [1737] 1 *Atk.*, p. 376.

authorities for over 300 years. Counsel cited and commented upon the following cases:—*Powell v. Morgan* (o); *Garrett v. Pritty* (p); *Webb v. Webb* (q); *Cleaver v. Spurling* (r); *Loyd v. Spillet* (s); *Morris v. Burroughs* (t); *Boughton v. Boughton* (u); *Earl of Northumberland v. Earl of Aylesford* (v); *Taylor v. Popham* (w); *Simpson v. Vickers* (x); *Lloyd v. Branton* (y); *Colston v. Morris* (z); *Cooke v. Turner* (a); *Egg v. Devey* (b); *Re Dickson* (c); *Stevenson v. Abington* (1) (d); *Evanturel v. Evanturel* (e); *Hurst v. Hurst* (f); *Connell v. Colonial Mutual Life Assurance Society Limited* (g); 11 *Jarman & Bythewood's Conveyancing*, 900, n.; 2 *Williams on Executors* (9th ed.), 1138; 2 *Jarm. on Wills* (5th ed.), 902. *Rhodes v. The Muswell Hill Land Company* (h) is a decision of Romilly, M.R., in which it is not suggested that there was any gift over, and it was not argued that a gift over would make any difference. It is a case of specific performance, and is decided on the ground that property is inseparable from the right to institute proceedings and the protection of the law, which would apply to all the cases, and which would apply with equal force to the hospital's right of property under the gift over. Further, it is directly at variance with the decision in *Adams v. Adams* (i), on which the plaintiff relies, for in that case the clause was held to be good; *Wilkinson v. Dyson* (k). As the difficulty is raised by the will, and the Melbourne Hospital has been held to be and has been added as a necessary party, and, its claim not being utterly absurd and baseless, it should get its costs out of the estate: *Hervey-Bathurst v. Stanley* (l).

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(o) [1688] 2 Vernon 90.

(p) [1693] 1 Vern. 293.

(q) [1710] 1 P. Wms., p. 135.

(r) 2 P. Wms. 528.

(s) [1734] 3 P. Wms. 344.

(t) [1737] 1 Atk., p. 404, and note.

(u) [1750] 2 Ves. Sen. 12.

(v) [1760] Ambli. 540.

(w) [1781] 1 Br. C.C. 168.

(x) [1807] 14 Ves. 341.

(y) [1817] 3 Mer., pp. 112, 113.

(z) [1821] Jac. 257 (n.)

(a) [1846] 14 Sim. 218; and on the hearing, 15 M. & W. 727.

(b) [1847] 10 Beav. 444.

(c) [1850] 20 L.J. Ch. 33.

(d) [1863] 11 W.R. 935.

(e) L.R. 6 P.C. 1.

(f) [1882] 51 L.J. Ch. 417.

(g) [1889] 15 V.L.R., pp. 746, 747.

(h) 29 Beav. 560; 30 L.J. Ch. 509.

(i) [1892] 1 Ch. 369.

(k) [1862] 10 W.R. 681.

(l) [1875] 4 Ch. D., p. 267.

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Higgins and Weigall for the plaintiff—No case has been cited where the Court has held that there was a forfeiture on bringing an action where there was valid cause of complaint against the trustee. Throughout the will there is disclosed one general purpose, an obligation on the trustees to perform their powers for the benefit of the beneficiaries. If there was no obligation it would be simply a gift to the trustee. It is submitted that the meaning of the phrase “any action at law or equity against my trustees” in the will is “any action against the trustees in the execution of their trust.” The plural is used in the will, “trustees,” so that the Melbourne Hospital is not within the letter of the condition where one trustee only has acted. In nearly all the cases cited there was a gift over after a life interest. It was merely a limitation of the estate. The true meaning of the clause, it is submitted, is that if a beneficiary attempts to interfere with the management of the estate—as by seeking to have the administration of the estate taken out of their hands and the estate administered by the Court, or the like—he shall lose his interest. In *Rhodes v. Muswell Hill Land Company* there was a direction that on forfeiture the gift should sink into the residue—that was an express gift over. In *Lloyd v. Branton* (m) it was held that a direction to sink into the residue was a gift over. In *Stevenson v. Abington* (1) (n) also a direction to sink into the residue was held equivalent to a gift over. In most of the cases cited there was a gift of a life interest only, and the direction to sink into the residue or the express gift over, as the case might be, was a conditional limitation of the estate. Other of the cases cited, as, for instance, *Cooke v. Turner*, were mere cases of election. *Egg v. Devey* was practically a case of election. In *Adams v. Adams* (o) there was a gift over of the residue.

Mitchell and McDougall for the defendants William James Wallace, Charles Dunkley Wallace, and John Alston Wallace the younger, and

(m) 3 Mer., p. 118.

(n) 11 W.R. 935.

(o) [1892] 1 Ch. 369.

Goldsmith for the defendant Teresa Ellen Monahan Wallace, proposed to argue in the same way as the plaintiff.

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Agg objected—These defendants are not interested in the question of whether the plaintiff has lost his interest or not. Your Honor has declined to allow me to raise any question between them and the Melbourne Hospital.

Mitchell and *Goldsmith* contended that for their respective clients they had an absolute right to be heard upon any question of construction of the will or administration of the estate.

Agg in reply—The question of construction does not concern them, as your Honor has ruled that I cannot in this action affect their interests. The whole argument for the plaintiff is that this is not a question of the administration of the estate.

MADDEN, C.J. I think that they are entitled to stand in the same position as Mr. Agg was, and have a right to argue upon the meaning of this clause and the interpretation of this will.

Mitchell and *McDougall*—A trust defined as in *Lewin on Trusts* (9th ed.), 11, can only be enforced by subpoena in Chancery. The testator intended to give his grandsons large equitable interests in the trust estate, and having undoubtedly made this clear in the early part of the will, the latter part of the document, which would deprive the beneficiaries of the means of getting their interests, is absolutely repugnant to the trust.

[MADDEN, C.J. If a testator desires to create a trust, and says that sooner than have the beneficiaries go to law he prefers that the trust should fall through, would you say that that was not good?]

We would not argue that if that was expressly stated it would not be good, but in the will under notice there is nothing of the kind. It is also submitted that the clause is against public policy, inasmuch as it seeks to deprive courts of their lawful jurisdiction. It is a principle of law that parties cannot

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by contract oust the courts of their jurisdiction: *Scott v. Avery* (p). If this is held in the matter of contracts, how much more should it be held in regard to trusts.

[MADDEN, C.J. The difference is that a person contracting with another has rights which ought not to be excluded because his right to an obligation on the other party is part of the consideration for his entering into the contract; but the person receiving a bequest has no rights except to take or leave the gift: he is simply an object of benevolence or bounty.]

The question which is raised in the one case would apply to the other, that it is against public policy that courts should be ousted of their jurisdiction.

Goldsmith for the defendant Teresa Ellen Monahan Wallace —The forfeiture clause, if given the meaning contended for by the Hospital, is repugnant to the previous gift. If it means that a trustee could do what he liked with the property, it is decidedly against public policy. The present action is one which seeks not to oppose, but to enforce, the intentions of the testator, by having the management of the trust estate properly carried out. If the clause is neither absolutely repugnant nor against public policy, we have to see how far it goes, and the case of *Adams v. Adams* then shows that it is bad if it does more than prohibit vexatious or frivolous actions. The case of *Evanturel v. Evanturel* was decided upon the Code Napoleon.

Agg for the Melbourne Hospital, by permission of the Court —The cases show these conditions at civil law are *rei licitae*, and if there is a gift over they are good. The common law has nothing to do with it. The Privy Council, while deciding *Evanturel v. Evanturel* upon the code as applied in Canada, went out of their way to lay down a guide for English decisions, which ought to be followed, especially by this Court. In *Adams v. Adams* there is no direction that on forfeiture the gift should fall into the residue. No case has been cited for the plaintiff to show that the forfeiture will not be enforced where, as here, there is an express gift over.

(p) [1855] 5 H. L. Cas. 118.

MADDEN, C.J. I propose to dispose of this now. I have heard it very elaborately argued. I have heard a very able and exhaustive argument, and I am not likely at any other time to remember or appreciate the arguments advanced by counsel as I do now. The testator here, after declaring certain trusts in favour of certain of his grandchildren, makes this declaration—"Any and every person and persons entitled to any benefit under this my will whether presumptively or absolutely who shall take any proceedings either at law or in equity against my executors or trustees for the time being or shall institute any suit in any court of competent jurisdiction for the administration of my estate shall absolutely forfeit all benefit to which he she or they shall be entitled under my will and the same shall belong and be paid to the treasurer for the time being of the Melbourne Hospital for the benefit of that institution." The plaintiff Peter Brown Wallace has, through his next friend, brought this action, and the defendant John Alston Wallace has pleaded that by force of that act he has lost all his interest under this will; that his interest is forfeited, and has passed by the gift over to the treasurer of the Melbourne Hospital; and that therefore he is no longer at liberty to sustain this action. The question now is, What is the meaning of that forfeiture clause, and how far is it lawful, if lawful to any extent at all? The other persons parties are the other beneficiaries and the Melbourne Hospital, which is represented by Mr. Agg, who has contended, first that the clause is perfectly effective and to its full extent as against the plaintiff, and therefore that the contention of Mr. John Alston Wallace is correct. He also sought to contend that not only is it good against the plaintiff, but also against his brothers, Messrs. Charles Dunkley Wallace and John Alston Wallace the younger, because they were behind Peter Brown Wallace and instigating him to bring this action. The authorities cited to me appear to establish this clearly enough—first, that if there is a condition in the will, not illegal in itself, to forfeit a benefit under a will, and there is no gift over, the Court will exercise its general jurisdiction, either to disregard the clause altogether as a mere threat, or to relieve against the forfeiture which would otherwise arise. In the next

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place, it seems to be decided by a line of authority that if the condition clearly expresses the testator's intention, and is not in itself illegal, and if there is a gift over expressed on breach of the condition, then the Courts will not interfere, except to enforce the forfeiture, chiefly on the ground that the testator in making the benefit saw fit to attach a condition which is a lawful condition to the taking of the benefit by the first beneficiary named, but on the condition that if that beneficiary did or did not do something lawful in itself which the testator desires the property vests in another person. Cases have been decided where the intention of the will was clear and it was lawful, and the testator made a gift over to another person, and in those it was held that the Court is bound to recognize the right of that other person, and will not interfere except to enforce the forfeiture. On the other hand, if the condition is in itself illegal the Court will not enforce it whether or not there is a gift over, for the Court will not lend itself in the least degree to enforce that which is illegal. If those be the three propositions—and it appears to me they are—to be gathered from the cases cited (except that of *Adams v. Adams*, which I am coming to presently) the first thing that the Court has to do is to find out what is the real intention of the testator, as conveyed by the condition which is challenged. If it is clearly expressed and not illegal the Court enforces it. If it is not clearly expressed the first duty of the Court is to interpret the will, and if its true intent be not unlawful the Court will enforce it so as to effectuate the real intention of the testator. In the present case it has been argued, on behalf of the infant plaintiff, that the clause is plainly repugnant to that portion of the will of the testator by which he gives to his grandsons the property which he has expressed his desire to give—that is, that he has created a trust that when they attain 21 this property shall be theirs; but the forfeiture clause reduces it to this—"I give you this property, but if you attempt to possess yourself of it against a wrong-doing trustee you shall not have it." It is contended that that is a repugnant provision, and the case of *Rhodes v. Muswell Hill Land Company* would be an authority, I think, to that effect. That case was

not a dictum, for though it arose between vendor and purchaser, the will formed an important link in the title. But the Court there said a clause like this in circumstances like this is repugnant and ridiculous on its face, and should be struck out of the will altogether. As, therefore, it is a decision bearing distinctly on this point I do not know what I should do with it if I were disposed to think this clause was bad to all intents and purposes. I am not disposed to definitely offer an opinion on that point. It is the decision of a highly qualified judge as to such a clause being altogether unenforceable, but the view which I take is that unless the clause be repugnant it is a perfectly lawful condition to impose. As far as the question of being against public policy is concerned, or as to any other illegality, the clause would be quite lawful and it is followed by a gift over; then if it were also perfectly clear that the testator desired to stop actions like the one before the Court the hands of the Court would be tied. I have therefore to find out to what extent the intention of the testator goes. It appears to me—the more I consider it the more plainly—that the testator's intention was to stop any of those actions which we find young men and young women who are beneficiaries under wills are so frequently misled into bringing—either from bad advice or want of brains, or prompted by people who have some end to serve; such people frequently bring actions in this Court which waste a lot of money, which annoy trustees, embarrass them very much, and expose family troubles and squabbles to the public. I think it is clear that the testator intended to stop that kind of action. There are a lot of people willing to instigate beneficiaries to litigation, and so bring money into their own pockets. A testator, as a sensible man of the world, wants to stop that. It is also plain enough that he had implicit confidence in his trustee, and desired to protect him. He wanted to protect his estate being brought under administration by the Court, which might be done for very simple *lâches*. He apparently desires that that shall not happen. Therefore he says anybody who takes such steps as those shall forfeit his interest. But there is a very large class of actions which constitutes the

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only remedy the law allows to beneficiaries to protect the estate from waste, and to ensure that that which was left for the beneficiaries' enjoyment shall be kept for that enjoyment, and not squandered at the will of the trustee. If the will be examined, it is plain that the testator did not intend to deny this class of relief. Otherwise he could have declared in express and distinct language, as in the case of *Egg v. Devey* cited to me, that he preferred that his trustee should make away with the estate rather than it should be squandered in law. There are people who would prefer the estate to go elsewhere rather than that family squabbles should be brought up before the public. But if they do so desire they must state it expressly in their wills, as it is not the view of the great body of mankind. Looking at the will in this aspect the scheme of it is this :—There is a provision for the wife for life, and for the daughters and families ; then, setting aside a certain sum of money to provide for annuities, and giving a discretion as to how much should be set aside, he provides that the property is to be sold, and directs that as far as the sale of the realty is concerned he wants it sold at once, but gives a discretion to postpone its sale and let it while unsold. He then specifically requires that the proceeds of his property when realized shall be invested in two classes of investment—Government stocks or debentures in Victoria or New South Wales or first mortgage of freehold estates in Victoria. He is specifically distinct as to those two classes of investment. That being so, it is clear that when he desires a discretion to be exercised he says so. Where he inclines to be definite as to what is to be done he is equally express. Therefore I think it must be taken that he intended as part of his will that his directions as to investment should be enforced against the trustees just as much as he intended that his trustees should not be bothered by improper actions by beneficiaries. As he says the trustees are to obey his directions as to investment, and as the only way in which obedience can be enforced is through the law (unless he has expressly shut it out), it seems to me that that course should be open to the beneficiaries under the will on a fair case arising *bond fide*. Therefore I think the will should be

read in that view, which is a reasonable view if the clause be not bad altogether. I say it does not, having regard to the whole will, appear to exclude a reasonable *bond fide* action brought by beneficiaries to have the property reinstated, or the trust fund prevented from being wasted by breach of trust, while it does exclude a trumpery or unreasonable or merely meddlesome action. That is borne out by the case of *Adams v. Adams*. It was tried in the Court below before Fry, L.J., a very eminent judge, and in the Court of Appeal before three very eminent judges. In that case they had to interpret a clause which provided that if a beneficiary intermeddled with or interfered in, or attempted to intermeddle with or interfere in the management of the testator's real and personal estate, he should forfeit his annuity under his father's will. The beneficiary there brought an action to have the trustee removed on the ground of various alleged breaches of trust which the Court held were mere nonsense. The Court below held that the clause did operate, because the action was frivolous and vexatious, and was an attempt to interfere in the management of the trust estate. If the plaintiff's interest was forfeitable in any case, those four judges need not have troubled themselves to determine between a frivolous and a *bond fide* action, for the one would as much interfere with the management as the other, and if *bond fide* was more likely to be successful. The cases which have been cited to me I think have the effect which I have stated earlier in the three general propositions. *Evanturel v. Evanturel* was a case in which the Privy Council decided the effect of a clause in the Code Napoleon. In the course of the case apparently their attention had been called to certain English decisions, and by a dictum which was altogether apart from their decision pointed out what the position was with regard to forfeiture clauses in wills, and approved of what was said in *Cooke v. Turner* (q), in which the intention of the testator was as clear as noonday. The testator gave a legacy to his daughter provided that she did not dispute his will, and the Court of Exchequer held that by disputing the will she had forfeited her legacy. They held that there was no public

(q) 15 M. & W. 727.

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policy in the matter, but that the clear intention of the testator was plainly expressed, with a new disposition of the property on the will being questioned, and therefore it was held that the forfeiture clause was effectual and lawful. In the case of *Egg v. Devey* (r), a mother, by her will, left a legacy to her son. Her father had died before her, leaving a will appointing trustees, and those trustees had lost their testator's money in their own business, and therefore were guilty of breaches of trust. The mother left the legacy to the son on condition that he did not interfere with the trustees of her father's will for their misconduct, and she said in terms what she meant. There could not be any doubt as to what she meant. If that had appeared here—if the testator had inserted in the clause “whether my trustees are guilty of breach of trust or not”—it might be a different case. There the testatrix made what she meant quite clear. In *Loyd v. Spillett* (s), a legacy was given on condition that a legatee did not raise some rights which she would have had under the custom of London as an orphan unprovided for. In that case the Court held that the forfeiture clause did not apply, and the only reason it did not apply, having regard to the cases which preceded it, must have been that the action was a fair and reasonable action. I think it is an authority probably on the same lines as *Adams v. Adams*. Without going through all the cases cited it appears to me that what I have said on an examination of those authorities is correct. Where the intention of the testator, as gathered from the whole of his will, is to the effect that a reasonable, honest action may be brought without forfeiture the clause in that case will not operate as a forfeiture; it will not operate unless the will says—“No matter what the ground of litigation may be the forfeiture is to occur.” In this case, as at present it appears to me, it is a *bond fide* action, and I decide that the clause although not repugnant does not stop the plaintiff provided he establishes as a matter of fact that his action is a *bond fide*, reasonable one.

The Melbourne Hospital then retired from the case.

(r) 10 Beav. 444.

(s) 3 P. Wms. 344.

Evidence for the defendant John Alston Wallace was then called.

At the close of the evidence for the defendant John Alston Wallace, the plaintiff obtained leave to recall witnesses to show that the plaintiff, though he had written certain letters to his father stating the contrary, always desired, and still desired, that the action should be brought and continued. Among others the plaintiff recalled the defendant Charles Dunkley Wallace, and proceeded to ask him certain questions to show that this was not a solicitor's action.

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Topp objected—The evidence now tendered is not within the limits of the permission granted.

Higgins and *Weigall* for the plaintiff contended that as Mr. Wallace's counsel had repeatedly suggested that it was a lawyer's action they had a right to prove that the aspersion on the plaintiff's solicitor was unwarranted.

MADDEN, C.J. The suggestion that the action was instigated by the plaintiff's solicitor is entirely irrelevant to the issues in the case. I disallow the question.

Topp for the defendant John Alston Wallace then proposed to cross-examine Charles Dunkley Wallace generally.

Higgins and *Weigall* objected that he was recalled only for a particular purpose, which the Court had ruled could not be entered upon. They therefore urged that he was not again subject to cross-examination.

MADDEN, C.J. I am of opinion that although the witness is recalled for a particular purpose, which I have ruled irrelevant and disallowed, yet as he is in the box Mr. Topp has a right again to cross-examine him. The rule will be found expressly laid down in *Taylor on Evidence* (9th ed.), 942, and *Phillips v. Eamer* (t), and other cases there cited.

The evidence was then closed.

(t) [1795] 1 Esp., p. 357.

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The evidence and arguments on the main case sufficiently appear from the judgment.

Mitchell then summed up the evidence.

MADDEN, C.J. I am prepared to find that Mr. Wallace thought that he was acting an honest part, and thoroughly believed his position was warranted in law. That led him into a position of great liability, and one in which it was impossible for the Court, however much it appreciated Mr. Wallace's honest intentions, to allow him to remain in the position of trustee. I am quite prepared to facilitate the retirement, doing what justice demands should be done in the least offensive manner possible. There need be no imputation of dishonesty or self-seeking motives. I am satisfied Mr. Wallace has been wholly misguided by a misinterpretation of his position, and he has been confused as to his mixed duties of father and trustee. There can be no question that flagrant and lamentable errors have been made by him.

Topp and *Hayes* for the defendant J. A. Wallace—The position Mr. Wallace takes up is this: that as there is no imputation on his honesty or business ability, and as the testator has placed the greatest confidence in him, he should remain a trustee and have one or two other trustees associated with him. I should strongly urge that that course should in the interests of all—and he himself is now a beneficiary—be adopted. The very forfeiture clause, whatever its legal interpretation may be, shows the confidence Mr. Monahan had in him, and the Court will also have gathered it from the evidence. If your Honor does not adopt my suggestion Mr. Wallace is willing to retire, provided a trustee company alone be appointed in his place, but not otherwise.

MADDEN, C.J. As to the first position it appears to me that the law does not permit me—even if I were willing—to retain a trustee who is challenged with and has plainly been guilty of breaches of trust whereby he becomes a debtor to a very great

extent to the trust estate. It cannot be that he himself should remain as trustee when his very first duty would be to compel himself as speedily as possible to repay these moneys to the trust estate, no matter how his integrity and business ability may be regarded. I see every reason to be satisfied with Mr. Wallace in those respects. Though he has gone very far in departing from the testator's intentions, I do not think that he was actuated by any dishonest motive or intention. He appears to have conducted business in a general way with great success, and some of these matters of breaches of trust are not inconsistent with a good business capacity, but at the same time there is not the least doubt that he is much more fitted for business than he is for carrying out his trust in accordance with the law. I think, for these and the other reasons I have already expressed, I could not consent to vary the well-established principle of law which applies to the facts as I have found them. As to associating him with two new trustees, that seems to me to be useless. If he agreed with them his presence is unnecessary—if he did not, he ought not to be there. With every goodwill towards Mr. Wallace, I do not think I could leave him in charge to any extent. I will not believe that he will decline to give his utmost assistance to any trustee. If the parties see no objection I would be willing to appoint a fitting trustee company, and would follow the ordinary practice of referring it to Chambers to choose such a company.

Higgins in reply—The plaintiff desires to have the ordinary reference to appoint new persons or a person or a company to be trustees or trustee. The various breaches of trust have been proved. We ask for relief in respect of them, together with interest, calculated upon half-yearly rests, to which we are entitled: *Gilroy v. Stephens* (*u*). We also ask for an inquiry as to whether any other breaches of trust than those alleged and proved have been committed.

[MADDEN, C.J. It is only as to those matters of which you have given sufficient evidence that I shall declare a breach of trust. The Court itself is to ascertain what is a breach of trust.]

(*u*) [1882] 51 L.J. Ch. 834.

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It is submitted that Mr. Wallace should pay the whole of the costs of the action.

Topp—There should be only one set of costs to the plaintiff and defendants. Mr. Wallace should get the costs of the issues on which he has succeeded from the plaintiff, and the costs of the plaintiff, of Mr. Wallace, and of the Melbourne Hospital, as to the forfeiture clause, should come out of the estate, as they are owing to the testator having put a clause of doubtful meaning into his will.

[MADDEN, C.J. Is not that so? The costs in reference to the forfeiture clause are due to the testator's will. If this case dealt alone with that, costs of all parties should come out of the estate.]

Higgins—Were it not for the breaches of trust which we have proved no costs relating to the forfeiture clause would have been incurred. Mr. Wallace has failed to prove that the action was frivolous and vexatious.

[MADDEN, C.J. The ruling I have given is not that the defendant J. A. Wallace is bound to prove that the action is frivolous and vexatious, but that the plaintiff is bound to prove that the action is *bond fide*, so that he may get out of the clause, which otherwise would be a bar to him. I think the costs of all parties as to the issue of law under the forfeiture clause should come out of the estate. The other costs should be paid by the defendant Wallace to the plaintiff, as well as one set of costs to the defendants appearing.]

It is submitted that the defendant J. A. Wallace should pay the costs of the plaintiffs, at all events in relation to the forfeiture clause. He compelled the plaintiff to prove that the action was *bond fide* when he ought to have admitted that it was, and admitting it ought not in your Honor's view to have pleaded the forfeiture clause. We also ask for a receiver.

[MADDEN, C.J. The object of removing Mr. Wallace now, and not waiting for the report of the Chief Clerk on the various breaches of trust, is to do away with the necessity of a receiver. I do not distrust Mr. Wallace, although I do remove him,

and what I propose to order is that John Alston Wallace be and he is hereby removed from the trust, but that until a new trustee or trustees are appointed he is to receive moneys payable to and to make payments payable on behalf of the estate, without varying or altering the existing investments or the position of the estate generally.]

We are entitled to an inquiry as to the profits Mr. Wallace made with the moneys of the estate which he lent to himself.

[*Topp*—We are content to have an inquiry as to the profits, or as to what interest in lieu thereof should be given.]

MADDEN, C.J. Very well. I will give the other defendants one set of costs against Mr. Wallace. I will give the costs of the Melbourne Hospital out of the estate, and I will make an order that the defendant Teresa Ellen Monahan Wallace get her costs out of her share in the estate. The testator made his will, and in it chose to put this forfeiture clause—very embarrassing as to its meaning, and at first sight taking away absolutely any right to bring an action. It would so appear to any layman, and even to a lawyer it is not without reasonable ground of contention to the like effect. If it is necessary that the meaning of that clause should be solved, it should be solved at the expense of the testator, as he has made the embarrassment. According to universal law costs so caused are paid out of the estate of the testator. According to the meaning I have given to this clause it does exclude any beneficiary from the right to come to this Court unless he satisfies the Court that he has brought a reasonable and *bond fide* action. It has been argued that it rests on the trustee to show that the action is frivolous and vexatious. I think it does not; I think it rests on the plaintiff to show that it is a reasonable and *bond fide* action. The plaintiff has proved that this is a reasonable and *bond fide* action, and consequently he has got his right to come here. On the other hand, the defendant trustee has a perfect right to say—“This is no doing of mine. It is imposed on you by the testator to establish, and it was for the trustee to see that the forfeiture clause was not broken.” He had a right to say—“Before I consent to your right to sue I want to see your right to come here.”

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As to the plaintiff's solicitor, I think he has done his duty. It is rather unfortunate that he was a friend of the family, but I think there is nothing to call for harsh comment upon his conduct. If we forget him, this is the baldest question between trustee and *cestui que trust*, in which the trustee has a right to see that the obligation imposed by the will on his *cestui que trust* is fulfilled. The same thing would have been raised in any action, even if there had been no breach of trust by the trustee. The Melbourne Hospital might, in the event of his paying over his share to the plaintiff, have come to the trustee and required him to pay over again to it because the plaintiff had under the clause forfeited his interest. Though at first sight it presented some doubt, the more one looks at it the more proper it appears. It is a reasonable action and *bond fide*, and there have been breaches of trust in the respects indicated by the statement of claim. All of the breaches of trust have been established, but not to the full extent indicated in the particulars. As to the rest of the action, I think, as I have before indicated, that the trustee should be removed and a new trustee or trustees should be appointed, either a single company or one or two persons. I will make the order as to costs I have already said. I wish to have formal minutes submitted to me, and a list of the issues which the defendant J. A. Wallace claims to have had decided in his favour. I will then formally deliver my judgment.

Solicitor for the plaintiff: *Alston*.

Solicitor for the defendant J. A. Wallace: *F. G. Smith*.

Solicitors for the defendants W. J. Wallace, C. D. Wallace and J. A. Wallace the younger: *Crawford & Ussher*.

Solicitors for the defendant T. E. M. Wallace: *Malleson, England & Stewart*.

Solicitors for the defendants Keogh and Tobin: *Crisp, Lewis & Hedderwick*.

Solicitors for the defendant the Melbourne Hospital: *Gibbs & Heales*.

A. J. A.

[IN CHAMBERS.]

WALLACE v. WALLACE (No. 2).

1899
March 13.Hood, J.*Bias—Trustee—Appointment—Trustee company director—Counsel in action.*

The fact that one of the directors of a trustee company was counsel for the plaintiff in an action which resulted in the removal of such trustee, and the substitution of a trustee company in his place, does not necessarily prevent such company from being chosen as trustee upon the ground of unconscious bias.

APPLICATION on summons to discharge or vary the certificate of the Chief Clerk.

In this suit a decree had been pronounced by Madden, C.J., on the 21st October 1898 (*ante*, p. 859).

The Court declared, *inter alia*, that the defendant John Alston Wallace, the present sole trustee of the will and codicil of Thomas Monahan, should be removed from the office of trustee, and ordered his removal accordingly as on and from the date of the appointment of a new trustee or new trustees; and further ordered that an inquiry at Chambers be held to certify as to who would be two fit and proper persons, or what trustee company should be appointed trustees or trustee of the estate of Thomas Monahan deceased, in the place of John Alston Wallace, the defendant. Upon reference to the Chief Clerk to settle the appointment, it was certified by him that the Equity Trustees Executors and Agency Company Limited be appointed.

Upon the trial of the suit Henry Bournes Higgins, Esquire, appeared as counsel on behalf of the plaintiff, and had cross-examined at length the defendant John Alston Wallace. Mr. Higgins was one of five directors of the Equity Trustees, etc., Company. It was stated by Mr. Higgins that he would no longer act as counsel in the suit.

John Alston Wallace now applied to discharge or vary the Chief Clerk's certificate, upon the ground that the Equity Trustees Company were disqualified from acting as trustee of the estate of Thomas Monahan, one of the directors, Henry Bournes Higgins, Esquire, having acted as counsel for the plaintiff.

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Topp for the applicant—The defendant J. A. Wallace is entitled to be heard on the appointment of a trustee of this estate. He is entitled to a one-sixth share by reason of the death of his son, Thomas Monahan Wallace, one of the beneficiaries, unmarried and intestate. The fact that he is also a defaulting trustee does not deprive him of his rights as a beneficiary: *Lewin on Trusts* (9th ed.), p. 966. The rule upon which the Court of Equity acts in appointing new trustees is that it will not act to the advantage or on the suggestion of one beneficiary as against the others, but will hold the scales of justice evenly. There must not be the suspicion of bias. Mr. Higgins took a prominent part in the action. This trustee company was chosen for no other reason. It may result in loss to the estate. The appointment of a trustee is always a matter for the exercise of the Judge's discretion. The new trustee ought to hold an even hand between all parties. The Court has regard to any trust, and through whose instrumentality it can best carry the trust into execution. The interests of the estate and of the beneficiaries are not best served by this appointment. The Court will not pay attention to the wish of a beneficiary unless there is some other reason; here there is a reason: *In re Tempest* (a); *Forster v. Abraham* (b).

Goldsmith for the defendant T. E. M. Wallace also objected to the Chief Clerk's certificate, and upon the same grounds.

Weigall for the plaintiff was not heard.

HOOD, J. The objection really amounts to this, that the leading counsel against the defendant is one of the directors of the company that is sought to be appointed trustee of the estate, and that the counsel referred to would unconsciously be biassed against the defendant in all matters in connection with the estate of the deceased. I think that objection is altogether too far-fetched. I cannot conceive of any man being so biassed, or that any man endeavouring to do his duty would not be able to remove himself completely and thoroughly from all previous

(a) [1866] L.R. 1 Ch. 485, at p. 487. (b) [1874] L.R. 17 Eq. 355.

alliance with the matter. If the authorities went the length in regard to trustees that they go to in regard to magistrates, the matter might be different. But the ground of the objection is that he would be biassed unconsciously. There is no reason to suppose that that would be so, even if Mr. Higgins were to be the sole trustee. But Mr. Higgins, in fact, is not the manager of the company, nor is he the Managing Director. There is a distinct manager of the company, and there is a Board of Directors, of whom Mr. Higgins is one out of five. It seems to me that it is going a long way too far to say that, because Mr. Higgins has conducted the case as counsel, he would be so far unconsciously biassed as to be unable to take part in the management of the estate in an impartial manner.

There was another view, which at first struck me as having force. It was suggested that if two persons are nominated, equally eligible, and one of them is objectionable to the whole of the *cestuis que trustent*, the one who is objectionable ought not to be chosen. It was said here that there are several trustee companies, all equally eligible, and that the plaintiff has chosen the particular one which is objectionable to Mr. Wallace. If that were established, the defendant would have good cause for complaint. The Court ought not to appoint a trustee—there being no reason for it at all—who is obnoxious to the whole of the *cestuis que trustent*. On the other hand, the plaintiff is at liberty to say that he has chosen the company which he thinks is best, and that all the companies are not equally eligible in his point of view, and that he did not choose this company merely to annoy Mr. Wallace, or because Mr. Higgins was a member of it. The position which Mr. Wallace fills, being both trustee and *cestui que trust*, makes the matter somewhat difficult. As trustee, he would be adverse, in one sense, to any trustee appointed in his place. He would naturally feel sore at being removed. But in spite of that feeling he is bound to render every assistance to the new trustee; still, once he has done what devolves upon him as trustee, the subsequent dealings with the estate are very simple. Subject to an affidavit being filed by the plaintiff's solicitor, showing that the Equity Trustees Co. was not chosen merely to

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annoy Mr. Wallace, but that it was chosen because they thought it the best company, I refuse the application.

Application refused.

Solicitor for plaintiff: *T. C. Alston.*

Solicitor for defendant J. A. Wallace: *F. Grey Smith.*

Solicitors for defendant T. E. M. Wallace: *Mallison, England & Stewart.*

R. H. C.

[An appeal from this decision was heard by the Full Court, *in camera*, on the 7th, 10th, 12th, and 13th days of April 1899, and dismissed.—ED.]

F.C.
 1899
 June 2.

IN THE MATTER OF THE *TRANSFER OF LAND ACT* 1890.

IN RE O'CONNOR.

The Transfer of Land Act 1890 (No. 1149), ss. 93, 209—Administration and Probate Act 1890 (No. 1060), s. 6—Administratrix of administratrix, right of to be registered as proprietor.

The administratrix of an administratrix is not entitled to be registered as proprietor of land belonging to the estate of the original intestate.

The administratrix of an administratrix claiming to be entitled to be registered as proprietor of land belonging to the original intestate is entitled to proceed under sec. 209 of Act No. 1149, and to call upon the Registrar to substantiate the grounds of his refusal to register.

SUMMONS calling upon the Registrar of Titles to substantiate and uphold the grounds of his refusal to register the applicant in respect of certain lands. The facts stated in the case furnished by the Registrar were as follow :—

On the 6th July 1880 one Lachlan MacLean died intestate, and on 15th October 1880 letters of administration of his estate were granted to Hannah MacLean, widow. At the time of his death the said intestate was by certificate of title dated the 23rd October 1866 registered proprietor under the *Transfer of Land Act* of an estate in fee simple of certain lands. On the 22nd April 1881 the said H. MacLean applied as such administratrix to be registered proprietor of an estate in fee

simple of the said lands, and in pursuance of such application and of sec. 193 of the *Transfer of Land Act* the following memorandum was endorsed on each of the certificates :—" Memo. No. 2498.—H. MacLean, of Fitzroy, widow, is registered as proprietor of the within described lands as administratrix of the estate of L. MacLean, who died on 6th July 1880. Administration granted on 15th October 1880." On the 2nd November 1898 one Helen O'Connor lodged an application in the Office of Titles, dated 21st October 1898, whereby she applied to be registered as the proprietor of the said lands as administratrix, to whom letters of administration of the estate of H. MacLean, deceased intestate, were granted on the 13th June 1889. Registration of the said H. O'Connor as proprietor of the said lands which still form part of the estate of the said L. MacLean was refused, whereupon the said H. O'Connor required the Registrar of Titles to set forth the grounds of refusal under sec. 209 of the *Transfer of Land Act* 1890. In answer to such requisition the Registrar replied that though strictly speaking the applicant was not entitled to call for grounds under sec. 209 (she not being an owner or proprietor of the said land within the meaning of that section) the commissioner would not raise that objection, but would give the grounds asked for, and in pursuance thereof the following are stated as the grounds of such refusal :—

"(1.) The fact that applicant is the administratrix of the administratrix of the intestate L. MacLean does not entitle her to be registered as the proprietor of the unadministered estate of the said L. MacLean. (2.) The said lands continue to form part of the estate of the said L. MacLean and form no part of the estate of the said H. MacLean whereof administration was granted to the applicant H. O'Connor and the administration bond entered into by applicant for due administration by her as administratrix under the said letters of administration do not cover and were not estimated so as to cover the said lands and the applicant has no duties or responsibilities imposed on her as such administratrix in respect of the unadministered estate of the said L. MacLean and her position even if registered would not be that of an administratrix *de bonis non* of the said L. MacLean but merely that of a dry trustee without powers. (3.) The only person who

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can be registered as administrator of the said lands will be some one to whom letters of administration *de bonis non* of the estate of the said L. MacLean may be granted by the Court and who shall have entered into the requisite bond for due administration. (4.) Sec. 6 of the *Administration and Probate Act* 1890 does not entitle an administrator of an administrator to be registered proprietor under the *Transfer of Land Act* 1890 of the unadministered lands of the original intestate even though the original administrator became registered as proprietor of such lands for the memorandum of registration discloses the fact that he is so registered in his capacity as administrator and that therefore the lands are the hereditaments of the original intestate and not hereditaments of the intestate administrator within the provisions of the said section. (5.) Sec. 193 of the *Transfer of Land Act* 1890 does not entitle an administrator of an administrator to be registered proprietor of the unadministered lands of the original intestate even though the original administrator became registered as proprietor of such lands inasmuch as the office of administrator is strictly personal created by the Supreme Court and both the office and the estate in the intestate's lands with which such office clothes the person appointed administrator die with him and there is no 'estate' within the meaning of that section which survives to pass on to his own administrator whereof such administrator could be registered under the said section and the privity or connection between the administrator of an administrator and the original intestate or his estate exists. Hence it appears that neither sec. 6 of the *Administration Act* nor sec. 193 of the *Transfer of Land Act* nor the two sections combined authorize the registration sought. (6.) To register as a matter of right under the said section an administrator of an administrator proprietor of the lands of the original intestate would be to destroy 'the certainty of title' (which the *Transfer of Land Act* is intended to secure) so far as the titles to the lands of intestates is concerned for in the large majority of cases such an administrator and his intentions and actions in respect of becoming registered or in respect of subsequent dealings with the land would be wholly unknown to and practically unascertainable by the next of kin of the original

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intestate (that is those beneficially interested in such lands) they would receive no notice of his application to be appointed or of his appointment as administrator or of his application as such administrator to be registered proprietor of intestate's lands and immediately upon his being so registered he could under sec. 193 of the *Transfer of Land Act* 1890 sell or mortgage the lands as unquestioned as if he were the absolute owner and could then dispose of the proceeds as he thought fit and such next of kin of the true owner be without any substantial remedy. In this case for instance it is nineteen years since L. MacLean died and H. MacLean his administratrix was at the time of her death resident in New South Wales. Such an interpretation of sec. 6 of the *Administration Act* and sec. 193 of the *Transfer of Land Act* would thus facilitate and almost invite frauds upon titles instead of assuring them to the true owners and this office does not feel justified in adopting such an interpretation without the express ruling of the Supreme Court."

Goldsmith for the Registrar of Titles—The applicant is not an owner or proprietor within the meaning of sec. 209 of the *Transfer of Land Act*, and cannot call upon the Registrar under this section to substantiate his grounds of refusal. The term "proprietor" is defined, but there is no definition of an "owner." The administratrix of an administratrix is not an owner of land belonging to the original intestate.

Hayes for the applicant—The applicant is a person claiming an estate of freehold within sec. 227. The word "proprietor" in sec. 209 is a definite and specific term, and the word "owner" is used to include all other persons claiming an estate. The practical effect of this application is that the applicant is really the owner in a legal sense.

PER CURIAM [A'BECKETT, HODGES, and HOOD, JJ.] We think we have jurisdiction to entertain the summons upon this application under the general term of "a person claiming." We may ultimately decide that the applicant has no claim; but the general words are sufficient to give us jurisdiction to hear the application.

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Goldsmith—(Counsel read the statement of the case and the reasons of the Registrar, and was then stopped by the Court.)

Hayes—By sec. 6 of the *Administration Act* 1890 the legal estate is vested in the applicant.

[A'BECKETT, J. The applicant could do nothing with the land under such a title.]

A trustee might be afterwards appointed.

PER CURIAM. We think the Registrar was undoubtedly right in his refusal to register. The application will be refused.

Solicitors for applicant: *Brahe & Gair*.

Solicitor for Registrar of Titles: *Guinness*, Crown Solicitor.

W. H. M.

F.C.

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April 18, 20.
May 29.

RE CHEYNE AND THE SHIRE OF EAST LODDON.

Local Government Act 1890 (No. 1112), s. 428—*Vermin Destruction Act* 1890 (No. 1153), Part II., ss. 57, 58, and 59—*Mandamus*—*Closed roads*—*Swing gates*—*Special area under Vermin Destruction Act*—*Permission of council to erect obstructions to roads*.

Permission given by a shire council under sec. 58 of the *Vermin Destruction Act* 1890 (No. 1153) to an owner of land within the shire (such land not being within a "special area" under Part II. of the Act) to enclose at his own expense his land, which is intersected with roads, with a continuous wire-netted fence having swing gates covered with wire netting when enclosing any road, is no answer to an application under sec. 428 of the *Local Government Act* 1890 (No. 1112) for a *mandamus* to open and keep open for public use and free from obstruction the roads across which such swing gates are erected.

THIS was an appeal from a decision of Hood, J., discharging a rule *nisi* for a writ of *mandamus*. The facts will be found in the previous report (*ante*, p. 703).

Isaac A. Isaacs (A.G.) (with him *Leon*) for the appellant—The fact that this property has not been proclaimed a "special area" under Part II. of the *Vermin Destruction Act* 1890 is fatal, and the alleged sanction by the shire council is invalid. Sec. 57 provides for the case of adjoining owners enclosing their lands with a continuous fence, provided such lands are within a special area, and sec. 58 is inserted to give a single owner the

same power, but only where his land is within a special area. Again, the permission was only given in the present instance to the lessees, and sec. 58 requires that the sanction of the council to the erection of the gates across the roads shall be given to the owners. The fact that the relator's conduct is actuated by ill-will has no effect, as he is acting for other ratepayers in requiring the obstructions to be removed. The relator has a right to have the public roads kept free from obstructions for public use, and his motive in such a case is immaterial: *In re Glenelg Shire, Ex parte Sealey (a)*.

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Mitchell and Cussen for the respondent—The view now presented was abandoned before Hood, J., by the counsel for relator. An appellant is bound by the way he presents his case in the Court below. Sec. 58 applies to single owners whether they are or are not within a special area. In a case where the property is not within a special area the Act assumes that the shire council would not grant its sanction except in a proper case. Part II. of the Act is headed "Special Fencing Provisions." Under sec. 57 the money can be obtained from the Government "if within a special area," and must be expended in putting up the fencing. In sec. 58 the words "if within a special area" are omitted, and the words "at his own expense" are inserted. This indicates that the case of a person who was willing to do this fencing at his own expense, apart altogether from obtaining the money from the Government, was in the contemplation of the Legislature, and consequently the words "if within a special area" are designedly omitted: *The Bank of New South Wales v. Piper (b)*. The application for this writ is not a *bond fide* one; its allowance is discretionary, and the exercise of that discretion by Hood, J., is not a matter for appeal: *Reg. v. Churchwardens of All Saints, Wigan (c)*. There is no real desire to have these roads thrown open. In *In re Glenelg Shire* it was assumed by Williams, J., that the application must be made by a person who is *bond fide* interested: *Reade v. Mayor &c., of St. Kilda (d)*; *Reg. v. Liver-*

(a) [1885] 11 V.L.R. 64.

(b) [1897] A.C. 383, at p. 389.

(c) [1876] 1 App. Cas. 611, at p. 619.

(d) [1888] 14 V.L.R. 829.

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pool, etc., Railway Co. (e); The Queen v. Garland (f). It was proved that the applicant did not desire that the obstructions to roads other than those erected under the *Vermin Destruction Act*, and which had existed for a long period, should be removed. Those obstructions are included in the present application, and the application, failing as to part, will be refused: *The Queen v. The Bristol, &c., Railway (g); In re Wall (h); The Queen v. St. Margaret, Leicester (i).* The sanction under the section can be given to the lessees as agents for the owners. Counsel also cited *The Queen v. Lambourn Valley Railway (k).* The writ should be addressed to the corporation, not the council: *Grant on Corporations*, p. 355, note (a); *Hardcastle on the Interpretation of Statutes* (2nd ed.), p. 82.

Box for the owners and lessees of the Serpentine estate adopted the arguments advanced on behalf of the respondent, and further urged that the Court were invited to insert the words "if within a special area" in sec. 58, which the Legislature have designedly omitted: *Smyth v. The Queen (l); County Council of Derby v. Urban District of Matlock (m); Reg. v. Justices of West Riding of Yorkshire (n).*

Isaacs in reply—Secs. 50 to 56 of the *Vermin Destruction Act* include every owner, whether his land is intersected with roads or not. No provision had been made in the statute for roads being fenced across, either in the case of single owners or owners whose lands were adjoining. Secs. 57, 58, 59 supply these provisions. He referred to *Worthington v. Jeffries (o); Caledonian Railway Co. v. North British Railway Co. (p).*

Mitchell, by permission, referred to *The Queen v. Lewisham Union (q); The Queen v. The Bishop of Chichester (r); Lion Insurance Association v. Tucker (s).*

Cur. adv. vult.

(e) [1852] 16 Jur. 949.

(f) [1870] L.R. 5 Q.B. 269.

(g) [1843] 4 Q.B. 162.

(h) [1890] 16 V.L.R. 686.

(i) [1839] 8 A. & E. 889, per Coleridge J., at p. 900.

(k) [1889] 22 Q.B.D. 463.

(l) [1898] A.C. 782.

(m) [1896] A.C. 318.

(n) [1898] 1 Q.B. 503.

(o) [1875] L.R. 10 C.P. 379.

(p) [1881] 6 App. Cas., p. 122.

(q) [1897] 1 Q.B. 498.

(r) [1859] 2 Ell. & Ell. 209.

(s) [1883] 12 Q.B.D. 176, per Brett, L.J., p. 186.

A'BECKETT, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] This is an appeal from the refusal of a *mandamus* to compel the Municipal Council of the Shire of East Loddon to keep open certain closed roads in performance of the obligation imposed by section 428 of the *Local Government Act* 1890. The roads referred to—53 in all—were closed under entirely different circumstances, and the obstructions to them may be divided into two classes. The first class existed in 1884, and may have been in existence much earlier. Most of them consisted of gates, some of fencing, and the only alteration since 1884 has been by wire netting, which has not made them more obstructive. The second class consists of swing gates, put up in 1897 with the permission of the shire council given under section 58 of the *Vermin Destruction Act*, which enabled an owner of land intersected by roads, with the sanction of the shire, to enclose his land with a continuous fence, putting swing gates across the roads. The swing gates put up under this authority were the inciting cause of the order *nisi* for *mandamus*, and are first dealt with by Hood, J., from whom this appeal is brought. Before him the only objection raised to the legality of the permission was the insufficiency of the notice of the meeting of the council at which permission was given. He refused the *mandamus* as to these gates because it was manifest that the irregularity, if material, could be cured by a properly convened meeting, and it would be useless to direct the council to remove obstructions which they could immediately permit to be re-erected. The argument on appeal raised an entirely new question, as it was contended that the council had no power to give the permission under any circumstances, the section under which they assumed to act only applying to land in a special area proclaimed under the *Vermin Destruction Act* 1890, which the land here was not.

Part II. of this Act, headed "Special Fencing Provisions," is in outline as follows:—The owners of land in a defined area may petition, stating the cost of wire-netting their properties, and undertaking to erect wire netting or rabbit-proof fencing to the satisfaction of the council, and the shire

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council on acceding to the petition may obtain a loan from the Governor-in-Council for the requisite materials which, when obtained, are supplied to the owners of land in this area, called a special area, with a notice specifying the fencing to be done under certain penalties. Then sec. 57 provides that two adjoining owners may, with the sanction of the council, enclose their properties as one; sec. 58, that an owner of land intersected by roads may, with the like sanction, enclose the roads with gates; and sec. 59, that adjoining owners may in like manner enclose roads crossing their property. Sec. 58 says:—"Any owner of land intersected with roads with the sanction of the shire council instead of having dividing fences between such land may enclose at his own expense the whole of such land with a continuous wire netting or other rabbit-proof or vermin-proof fence having when enclosing any road swing gates covered with wire netting." This section comes between two each of which qualifies the obligation imposed by the Act on an owner within a special area. Although this obligation is not specifically defined, looking to the object of the Act, and to the preceding sec. 49, it appears to be an obligation to enclose his land with a rabbit-proof fence. Sec. 58 is an almost necessary complement to the other sections, and its position amongst them suggests that it was only intended to relate to an owner subject to the Act. But it is contended that inasmuch as sec. 57 contains the words "if within a special area" and sec. 59 the words "under this part of the Act," and no such words are to be found in sec. 58, sec. 58 is not confined like the others to land within a special area, but should be read as of general application to any owner of any land in any shire, or at all events in any shire which is in fact infested by rabbits. Although there are no words limiting the operation of sec. 58 it contains words which have no meaning unless applied to land within a special area. It says the owner of land intersected with roads "instead of having dividing fences between such land" may, with the sanction of the shire, enclose the whole of his land. The words "instead of, &c.," which are used in a similar connection in the preceding section appear to us to assume the existence of an obligation to have dividing fences, and this obligation only exists in the case of land within

a special area. We should be extending the section beyond its manifest intention if we held it to apply to land not within a special area. In restricting its operation to land within such an area we are not speculating as to probable intention gathered from the position of the section in the enactment, and the purpose which it serves in completing the scheme of the Act. We are guided by the presence of words in the section itself showing that the privilege is conferred as an exemption from an obligation, and therefore was not intended for those to whom the obligation did not attach. Upon this construction of the section we hold that the obstructions in the second class have been put up without any valid authority, the council having no power to give the sanction they purported to give, and the *mandamus* must go as to these obstructions, which seem to have caused substantial inconvenience to the applicant and others. We do not anticipate that there will be any difficulty in drawing up the order in such a way as to particularize these obstructions and exclude the others.

As to these others, which have subsisted since 1884, the primary Judge stated that he was not satisfied with the *bond fides* of the relator, and thought that his only real cause of complaint was as to the gates put up under the *Vermin Act*. From the correspondence and the evidence before him he concluded that the other long-standing obstructions inconvenienced no one. The witness Mahoney, who has been described as the ruling spirit in the matter, says:—"The farmers do not object to the old gates or obstructions, but they object to the vermin destruction gates"—*i.e.*, to those recently erected. We agree with the learned Judge in thinking that the complaint as to the ancient obstructions was thrown in as a make-weight to save costs perhaps, in the event of the case failing as to the new obstructions. It appears from the affidavits that the removal of the old obstructions would injure not only the owners and tenants of the lands which they protect from rabbits, but adjoining owners who have been protected by the system of enclosure which the removal of these obstructions would break up. We think that no one was hurt by these old obstructions, and that but for the new gates no one would have complained

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of them. We should not weigh the disadvantages to one section of ratepayers by having the roads open against the disadvantages to another section of having them closed, if we considered that the closing was really injurious to anyone who came forward in good faith to complain. But in affording a discretionary remedy we are not prepared to hold that a ratepayer has merely to show that roads are closed to obtain as of course a *mandamus* to open them without any regard to their use to himself or to the injury which throwing them open would cause to others. We therefore refuse the *mandamus* as to the obstructions of the first class on the present application, influenced by the consideration that the refusal is not final, and would be no bar to an application by a person really aggrieved, should there be any such person, now or hereafter. As to costs, although the point on which we allow the appeal was not argued before the primary Judge it is noticed in the applicant's affidavit, and we are not disposed to deprive him of costs because his counsel only argued it at the later stage. The applicant did not enter into litigation with the shire precipitately, but offered to have a case stated on the admitted facts. In the main he has succeeded, and should receive his costs of the original application and of the appeal. Our judgment will probably make it unnecessary to incur further costs by taking out the writ.

Appeal allowed. Order absolute directing *mandamus* to issue one month from this date as to the obstructions to roads erected under the permission given under the *Vermin Destruction Act*, but not as to any other obstruction. Refer to tax costs of application and of appeal up to and including this order, such costs to be paid by the shire. Reserve future costs, if any. Liberty to apply.

Solicitors for the relator: *Quick & Highett.*

Solicitors for the Council of the shire of East Loddon:
Tatchell, Connelly & Dunlop.

Solicitors for trustees: *Whiting & Aitken.*

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HAUGHTON v. HOCKINGS.

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April 28.

Local Government Act 1890 (No. 1112), s. 429—Interference with creek—Mining on creek—Mining under Crown lease—Question of title—Ouster of jurisdiction of court of petty sessions.

Defendant was informed against under sec. 429 of the *Local Government Act 1890* for unlawfully interfering with a certain creek, which had been permanently reserved for public purposes, without the consent of the shire council. The defendant's interference consisted in conducting mining operations on the creek as the holder of a mining lease from the Crown of land comprising the creek.

On complaint by information before the court of petty sessions the magistrate held that no question of title was involved, and that he had jurisdiction to hear the case, and he fined the defendant.

Held, that a complicated and difficult question of title was involved, and the jurisdiction of the magistrate was therefore ousted.

Reg. v. Mayor, etc., of Walhalla (4 V.L.R. (L.) 470) explained and distinguished.

ORDER TO REVIEW referred to the Full Court by Hood, J.

The informant in this case was one William Haughton, secretary of the shire of Walhalla, who proceeded against the defendant under sec. 429 of the *Local Government Act 1890* for unlawfully interfering with a certain creek under the control of the council of the shire of Walhalla without its consent. It appeared from the evidence that the creek in question had been permanently reserved for public purposes, and that the defendant was authorized to mine in land comprising the bed of the creek, and did so by shovelling sand and otherwise conducting mining operations therein. The defendant's authority was from the Walhalla Tailings and Sluicing Company, who were the holders of a mining lease from the Crown of the land comprising the creek.

The information was heard before the Court of Petty Sessions at Walhalla, and the police magistrate presiding decided as a fact that the mining work done by the defendant was an interference with the creek, and that an objection raised as to his jurisdiction on the ground that a question of title was involved was untenable, and convicted the defendant.

The defendant then obtained an order to review upon the ground (so far as is material) "that the police magistrate had no jurisdiction to convict, as a question of title was involved."

This order was referred to the Full Court.

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Cussen for the informant to show cause—No question of title is involved.

Counsel referred to *Koh-i-noor Mining Co. v. Drought* (a); *Reg. v. Foster, ex parte Molyneux* (b); *Reg. v. Mayor, etc., of Walkalla* (c).

Finlayson for the defendant to move the rule absolute—In *Reg. v. Mayor, etc., of Walkalla* there was the case of a title impossible in law. *Hudson v. MacRae* (d) gives the meaning of ouster of justices' jurisdiction.

Counsel referred to *Parade Gold Mining Co. v. Royal Harry Gold Mining Co.* (e); *Sims v. Demamiel* (f); *Mines Act 1890*, secs. 5, 14, 15, 49; *Mines Act 1897* (No. 1514), sec. 11.

(Counsel was stopped by the Court.)

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] We are of opinion that a difficult and complicated question of title was raised by this case, and that it was raised *bond fide*, and that accordingly the jurisdiction of the police magistrate was ousted. The only thing necessary for us to do at present is to refer to the case of *Reg. v. Mayor, etc., of Walkalla* (g), because that case presented to us the only difficulty we felt in coming to a conclusion in favour of the applicant for the order to review in the present case, and that case was apparently an authority the other way. But it will be found that the facts of that case differ from this one. There the person who raised a claim of title did so under a miner's right and registered claim, and by virtue of this title he interfered with a creek which the evidence showed had been reserved for road purposes, and which creek had been taken under the charge of the council of the municipality. The Court decided that there was no question of title involved, and discharged the rule to quash the conviction of the justices. The reason for the decision of the Court was that this creek was in

(a) [1872] 3 V.R. (L.) 75.

(b) [1881] 7 V.L.R. (L.) 294.

(c) [1878] 4 V.L.R. (L.) 470.

(d) [1863] 4 B. & S. 585.

(e) [1876] 2 V.L.R. (L.) 214,
Stawell, C.J., at p. 221.

(f) [1895] 21 V.L.R. 634, Holroyd,
J., at p. 640.

(g) 4 V.L.R. (L.) 470.

every way in a position equivalent to that of a road, and that therefore without the permission of the council it could not be interfered with any more than could a road be. The Court says:—"It is in a similar position, therefore, to a road under which the council may permit mining to be carried on." Mr. Finlayson has argued before us that the fact of the creek being reserved for public purposes and not for road purposes distinguishes the present case from the former, and has referred to sec. 19 of the *Mines Act* 1890. That section provides that it shall be lawful for the holder of a miner's right or of a lease to mine upon or under roads, with the permission of the Board of Land and Works, if the Board have the care and management thereof, or from such other body as should have the care and management thereof. Now, apparently, in the *Walhalla* case the Court was dealing with the case of a creek as if that creek were a road and there was no right in anyone to mine on that without the permission of the council. But the present case is one where the creek is reserved for public purposes and not for road purposes, and where a person acts under the authority of a leaseholder who holds a mining lease from the Crown empowering him to mine and dig upon, in, and into this very creek. The defendant in this case worked at this creek and conducted mining operations in it on behalf of the leaseholder; therefore the same reasoning does not apply here as in the case of *Reg. v. Walhalla*, because in this case the defendant may have a perfectly good right to mine as he has done without obtaining any permission from the council. His rights are those under a lease from the Crown, which gives him authority to mine on the land covered by that lease. This is all one need say to show that this case is distinguishable from the *Walhalla* case. Therefore that difficulty is removed, and we think that in this case a complicated and difficult question of title arose, and therefore the jurisdiction of the justices was ousted.

We do not give any decision as to the question whether the rights of a leaseholder under a Crown lease are paramount to those of the council. A conflict might arise on that question which would raise a difficulty to be contested, but on that, at present, we give no opinion.

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This order to review will be absolute, with costs.

Solicitors for informant: *Stillman & Roberts.*Solicitors for defendant: *D. Wilkie.*

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May 18.Williams, J.

[PRACTICE COURT.]

DUTTON v. SHIRE OF WALHALLA.

Local Government Act 1890 (No. 1112), ss. 523, 524, 534—Prosecuting officer of municipality—Liability of council for cost of proceedings taken by prosecuting officer—Mandamus.

B., a police officer, who had been appointed by the president of a municipality to represent the council in all proceedings in courts of petty sessions, proceeded against D. for breach of one of the by-laws of the municipality. D. was fined, and then obtained an order *nisi* to review, which was made absolute, no one appearing to show cause. The order directed the costs of the order *nisi* to be paid by B. to D. By one of the by-laws of the municipality the police officer appointed by the council was authorized and instructed to enforce compliance with the provisions of the by-laws. B. refused to pay the costs, and D. proceeded by way of *mandamus* to compel the municipality to pay the same.

Held, that under the by-laws "enforcing compliance with the provisions" of the same did not authorize the police officer to take legal proceedings, and that no *mandamus* would lie compelling the municipality to pay to the defendant the costs of proceedings incurred by an officer appointed under sec. 523 of the *Local Government Act 1890*.

RULE *nisi* for a *mandamus* on behalf of Dutton, calling upon the council of the shire of Walhalla to show cause why a writ of *mandamus* should not issue compelling them to pay certain costs. It appeared that the applicant Dutton had been prosecuted by one George Brennan for breach of a by-law of the shire of Walhalla relating to processions. Dutton was fined in the court of petty sessions, and then obtained an order *nisi* to review such decision. Upon the return of the order *nisi* to review no one appeared to show cause, and the order was made absolute, with costs. The order of A'Beckett, J., making the order absolute directed that the costs of the order *nisi* should be taxed, and when taxed should be paid by Brennan to Dutton. Brennan refused to pay the costs, alleging that he could not, and that as the proceedings were taken by him as a prosecuting officer of and for the shire of Walhalla, the costs should be paid by the council of that shire. The shire did not

take part in the order *nisi* to review, and refused to pay the costs. During the progress of the case in the court of petty sessions the following appointment was put in :—

“Sec. 523, *Local Government Act* 1890 ; shire of Walhalla ; April 1893.—The undersigned, Robt. Mills, president of the shire of Walhalla, do hereby appoint G. Brennan inspector of nuisances and prosecuting officer under the *Health Act* 1890 and the by-laws of the shire of Walhalla, to represent the council of the shire in any court of petty sessions to be holden at Walhalla, or before any justices in all matters pertaining to the said council. R. MILLS, president of the shire of Walhalla.”

The by-laws, which were not exhibited in any affidavit, were by consent produced at the argument, and contained the following clause : “Rule 5, by-law 14.—The proper officer of the council or any police officer or constable or any other person whom the council may from time to time appoint in that behalf are hereby authorized and instructed to enforce compliance with the provisions contained in the foregoing by-laws numbered 2 to 14.” There was a by-law No. 4 relating to processions under which Dutton had been proceeded against.

Gussen for the shire to show cause—This rule should have been addressed to the corporation and not to the council. The order of A'Beckett, J., directs the costs to be paid by Brennan, and the Court will not vary the terms of that order. Sec. 523 of the *Local Government Act* 1890 provides for the appointment of an officer to prosecute in petty sessions (a). Brennan was appointed under this section. Then by sec. 524 provision is made for the reimbursement for all costs, charges, and expenses to which such officer may be put. Then by sec. 534, when the council has directed particular proceedings to be taken, provision is also made for meeting the cost of such proceedings. An officer cannot in his own discretion put the council to costs of appeals to the Supreme Court. The costs in question are not

(a) “Sec. 523. In all proceedings in any court of petty sessions or before any justice the clerk of any municipality or any other officer of the council appointed by the chairman of the municipality in writing under his hand may represent the municipality or the council in all respects as though he had been the party concerned.”

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costs of the proceedings in petty sessions, but costs of an order *nisi* to review in the Supreme Court.

(Counsel was stopped.)

McHugh to prove the rule absolute—The police officer was appointed under the by-laws, and prosecuted for and on behalf of the council for breach of one of the by-laws. The council stood by and allowed the prosecution to take place, and cannot now repudiate the responsibility as to costs. The by-law empowers the police officer to enforce compliance with the provisions of the by-laws, and the appointment under that by-law warranted Brennan in taking these proceedings. The council, having refused to pay these costs, may be compelled so to do by *mandamus*: *Reg. v. Oakleigh (b)*.

WILLIAMS, J. This was an application for a rule *nisi* for *mandamus* directed to the council of the shire of Walhalla. I was asked in the first instance to make the order calling upon the council to make a return to the *mandamus*, but I considered that the respondent should have an opportunity of being heard, and I granted the rule *nisi* only. It appears that there was some procession of the Salvation Army at Walhalla, and one Sergeant Brennan, whoever he may be—it does not appear whether he was a constable or anything else—took proceedings in the court of petty sessions against Dutton, who it appears was an officer in the Salvation Army, for a breach of the by-law relating to processions. I may state in passing that it was agreed I should look at the by-laws and at the original appointment of Brennan by the council. By by-law No. 4 regulations are made concerning processions. Brennan took proceedings against Dutton for breach of this by-law in the court of petty sessions and Dutton was fined; then Dutton, being aggrieved by such order, obtained an order *nisi* to review that decision; that order was made absolute by A'Beckett, J., and at the end of that order that learned Judge ordered that it be referred to the proper officer to tax the costs of the said order *nisi*, and then ordered that such costs, when so taxed, should be paid by

(b) [1884] 10 V.L.R. 67.

Brennan to Dutton. Therefore there is this objection at the outset, that the order directs Brennan, not the council, to pay these costs; no application was made to A'Beckett, J., to order the council to pay these costs on the ground that Brennan was an officer of the council, but the order directs that the costs be paid by Brennan. It is now urged that I should issue this *mandamus* against the council directing the council to pay these costs to Dutton. It is not an application by Brennan to be reimbursed his costs by the council, but the application is that I should compel the council to pay these costs to Dutton. The ground of the application is that Brennan was authorized by the council to institute these proceedings in petty sessions. Several objections have been taken, but it is not necessary to give a decision upon all of them.

The present applicant relies upon—first, the authority given to Brennan, and secondly regulation 5 of by-law No. 14. Now the authority is plainly one given under sec. 523; at the top of the document there is written "Sec. 523, Local Government;" but apart from that its contents show that it could only be an authority given under that section. (His Honor read sec. 523.) This authority is an authority by Robert Mills, president of the shire of Walhalla, to Brennan. (His Honor read the appointment.) Therefore it is clear that this appointment, if any good at all, can only be a good appointment by virtue of sec. 523. Robert Mills, president of the shire of Walhalla, has no power to appoint an officer to do this, except under sec. 523, therefore the appointment must have been made under that section. Then sec. 524 provides as to what is to happen if the party who is appointed incurs costs, or is made liable for costs in the course of the proceedings which he takes under that appointment; he is to be reimbursed out of the municipal fund. Apart from a consideration of sec. 534 there might be some ground for Brennan applying for a *mandamus* against the council so that he should be reimbursed. The Act evidently contemplates that this person is liable in the first instance for the costs and then he may apply to the council to be reimbursed for any costs he has been put to out of the municipal fund. That is one objection, and it seems to show that the order of A'Beckett, J., was properly

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made directing Brennan to pay the costs, his remedy if any being, as I have pointed out, to apply for reimbursement out of the municipal fund, and perhaps if the council refused he might apply to the Court by *mandamus* to compel the council to pay. Then sec. 534 raises another difficulty. That section provides that "The council may order proceedings to be taken for the recovery of any penalties . . . and may order the expenses of such prosecution . . . to be paid out of the municipal fund." That clearly contemplates an authority from the *council* to take the particular proceedings. There is no such authority here, and therefore I think that this appointment affords no ground for this application. Then resort was made to rule 5 of by-law No. 14. (His Honor read the rule.) There is no evidence that Brennan was a constable or police officer, but we will assume he was, and even then I do not think the words "enforce compliance with the provisions contained in the foregoing by-laws" include taking proceedings in the court of petty sessions in such a way as to render the council liable for the costs, unless he has been authorized to take the particular proceedings under sec. 534. I think that these words in the by-law, whatever they may mean in the Act, mean taking the ordinary steps—namely, to stop a procession, or, if it be a nuisance that is complained of, to remove the nuisance, and that sort of thing. I do not think that this by-law means that a constable is to go about bringing prosecutions for breaches of by-laws in courts of justice without further authority from the council under sec. 534, and so render the council liable for the costs of any proceedings which he may choose to take. The council assert that they never gave Brennan any authority beyond that original appointment, and they carefully abstained from taking proceedings to oppose the order *nisi* to review; they refused to recognize any liability in the matter. Under these circumstances I must discharge the rule *nisi* with costs.

Rule nisi discharged with costs.

Solicitor for applicant : *Jamieson.*

Solicitors for respondent : *Herald & Roberts.*

W. H. M.

[PRACTICE COURT.]

KELLEHER v. HEFFERNAN AND SCOTT.

1899
April 26, 27.

Police Regulation Act 1890 (No 1127), s. 58—Disputed property in possession of police—Application as to ownership of property.

Holroyd, J.

When a police constable under and by virtue of a valid search warrant has seized goods in the possession of a person charged in an information with having stolen such goods, he may, after the trial and acquittal of the person so charged, apply under sec. 58 of Act No. 1127 for an order as to the title in the property seized.

Coghill v. Warrell (16 V.L.R. 238) distinguished.

ORDER *nisi* to review the decision of the Court of Petty Sessions at Kyneton. Kelleher, a police constable, applied under sec. 58 of the *Police Regulation Act 1870* for an order directing him to hand over certain goods to one of two applicants. It appeared that Heffernan had been charged with stealing certain oats from one Scott, and had been acquitted; application had been made at such trial under sec. 496 of the *Crimes Act 1890* for an order directing the restitution of the oats to Scott. The Judge refused to make any order upon such application. It appeared that Kelleher had under and by virtue of a search warrant searched the premises of Heffernan, and had found and seized certain oats. Prior to the issue of this search warrant an information had been sworn by Scott against Heffernan, charging him with the theft of these oats (a).

When the matter came before the justices, they, considering the case covered by the decision in *Coghill v. Warrell*, decided that they had no jurisdiction to entertain the application. An order *nisi* to review this determination was obtained upon the ground that the justices had jurisdiction. The other claimant to the goods, Scott, did not appear.

Dr. McInerney to show cause—The justices had no jurisdiction to entertain this application under sec. 58 of the *Police Regulation Act 1890*. Application for restitution was made under sec. 496 of the *Crimes Act 1890*, and the presiding Judge

(a) The information was not before intimated that such information should the Court in the first instance, but be produced, and on a subsequent day during argument the learned Judge it was produced.

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refused to make the order. Practically, if the justices now heard the application and decided against Heffernan, such decision would be inconsistent with the acquittal of Heffernan on the charge of stealing. In *Coghill v. Warrell* (b) it was decided that this sec. 58 did not apply to such a case.

[HOLROYD, J. In that case it was decided that the search warrant was not valid. No person was charged with stealing the goods in that case, and the Court founded its judgment on the ground that there was no information against anyone, which distinguishes that case from the present.]

The search warrant in this case was not founded upon any information charging Heffernan with the theft of these goods.

Wasley—There was an information directly charging Heffernan, and the search warrant refers to it.

[HOLROYD, J. That information should be produced if there is any doubt about it.]

The constable, having got these goods by virtue of the search warrant, it was the duty of the police to return them as soon as the criminal charge broke down; that is the effect of the decision in *Coghill v. Warrell*.

HOLROYD, J. No, that is the difference. In that case they purported to proceed under a search warrant which was wrong, and there had never been an information against anyone, whereas here there was a warrant issued, as I understand, upon a sworn information against this particular person to apprehend him, and also to search for the goods alleged to have been stolen. In that case the warrant was bad, here the warrant is good; therefore the police had lawfully got the goods into their possession. The cases are distinct. The police there never had a valid warrant, and practically had not the goods in lawful possession. The search warrant was merely to assist the criminal law, and the ordinary application was made after the criminal law had been vindicated, and the application could not be renewed under this sec. 58. Some limitation must be placed upon the terms used in that section.

(b) [1890] 16 V.L.R. 238.

Wasley to move the order absolute was not called upon.

HOLROYD, J. I think I had better see what this information really is. As at present advised if this was an information charging Heffernan with stealing these goods, then I think the police were correct. The constable had the goods lawfully in his possession, and he was therefore right in proceeding under sec. 58, and the magistrate had jurisdiction to entertain the claim, and was wrong in deciding that he had none, and subject to the production of the information I must decide that the magistrate was wrong.

Upon a subsequent day the information and search warrant were produced, and it clearly appeared that the information was laid charging Heffernan with stealing these goods, and the search warrant was issued upon that information so charging him.

HOLROYD, J. The information is laid, as I supposed, charging Heffernan with the theft of these goods, and therefore the constable was justified in making the application, and the justices were wrong in refusing to entertain it.

Order absolute. Case remitted to justices.

Solicitor for Kelleher : *Guinness*, Crown Solicitor.

Solicitor for Heffernan : *McInerney & McInerney*.

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April 17, 24.

Holroyd, J.

[IN CHAMBERS.]

IN RE HILL. HILL AND OTHERS v. DURHAM AND ANOTHER.

Practice—Taxation of costs—Party and party—Originating summons—"Instructions for brief"—"Clerk's fee"—"Trial"—Action—"Consultation"—"Conference"—"Rules of Supreme Court 1884"—Order LXV., r. 27 (45)—Scale of costs.

Upon the taxation of the costs of an originating summons as between party and party the item "instructions for brief" will not be allowed.

Where there is no contest as to facts there is no trial, and consequently on taxation of costs as between party and party no "managing clerk's fee" will be allowed.

REVIEW OF TAXATION.

Upon the hearing of an originating summons brought by the persons beneficially interested under the trusts of the will of Joseph Hill deceased against C. J. Durham and John Allison, the trustees of the will of Joseph Hill, in order to determine, under Order LV., r. 3, of the "Rules of the Supreme Court 1884," certain questions relating to the will and estate of Joseph Hill, it was ordered that the defendants should pay to the plaintiffs the latter's taxed costs.

Upon the taxation of the plaintiffs' bill of costs, the taxing officer signed his *allocatur*, whereupon the plaintiffs and defendants severally carried in certain objections to the taxation, upon which the officer gave the following reasons:—

"This was an application of the plaintiffs by way of originating summons, herein dated 13th February 1899, and was heard by Holroyd, J., in Chambers, on 1st March 1899, and by order of the last mentioned date it was referred to the proper officer of this Court to tax the costs of the plaintiffs herein.

"The plaintiffs object to the disallowance of the following items (setting them forth). All these items are in connection with a conference between counsel for the plaintiffs. The plaintiffs are entitled to costs as between party and party only; and as Mr. Wyburn, the solicitor for the plaintiffs, has been allowed for drawing the originating summons and the affidavits filed on behalf of the plaintiffs herein, and also counsel for settling the originating summons and Mr. Wyburn's affidavit, it did not appear to me that there was

any special reason for a conference, or that such was necessary or proper, and therefore in the exercise of my discretion these items were disallowed. *Vide* 'Rules of Supreme Court 1884,' Order LXV., r. 27 (45), *Special Allowances*; *Hamilton, Judicature Act*, p. 475.

"As to the defendants' objections. Item 18, page 8, refers to 'instructions for brief.' The plaintiffs' solicitor claimed 84*l.*, and upon taxation I allowed 10*l.* Upon review of such taxation it appeared to me that I had no discretion to allow more than 6*s.* 8*d.* in respect to the item 'instructions for brief' upon an originating summons heard in Chambers, and not referred into Court, and therefore I allowed 6*s.* 8*d.* only. I would refer to the *Annual Practice* 1899, vol. ii., p. 184, Fee 82A (also Fees 81 and 82); also to the *Annual Practice* 1895, vol. ii., p. 181, Fee 81; and to the following cases:—*In re Anglo-Austrian Printing and Publishing Union* (a); *Barber v. Crosbie* (b); *Marwick v. Orton* (c).

"The defendants' further objections (setting them forth) refer to counsel's fees, and are objections as to quantum merely. In the exercise of my discretion they appeared to me fair and reasonable, and I disallowed these objections.

"Objection item 9, page 15, relates to the 'clerk's fee, 1*l.*,' and applying the principle laid down in *Marwick v. Orton* (c) as to what is a 'trial,' I allowed this objection, as there was no real dispute in Court as to the facts.

"P. A. McANULTY,

"11/4/99.

"Taxing Officer."

A summons to review the taxation was obtained by the plaintiffs.

T. A'B. Weigall in support—*Barber v. Crosbie* (b) establishes that the words in the scale "every such brief" necessarily refer to the brief described beforehand, and that is a "brief on the hearing or trial of an action." (Counsel referred to *Annual Practice* 1899, vol. ii., pp. 184, 82 (A).) An originating summons is an action—*In re Anglo-Austrian Printing, etc.*,

(a) [1894] 2 Ch. 622.

(b) [1896] 17 A.L.T. 313.

(c) [1894] 16 A.L.T. 14.

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Union (d)—and is commenced by a summons in Chambers instead of by writ of summons.

Counsel referred to *In re Portland, etc., Company Limited v. Austral, etc., Company Limited* (e); *In re Holloway* (f); *Stroud's Judicial Dictionary*, "Trial."

Topp to oppose—The Rules do not contemplate any allowance for "instructions for brief" in the case of an originating summons. "Such brief" means the same brief: *Annual Practice* 1893, vol. ii., 178 (n.); *In re Anglo-Austrian, etc., Union*. A special item, 82A, is added in England: *Annual Practice* 1899, vol. ii., 183. It was never intended, when these rules were framed, to give any fee for instructions for brief in an originating summons. There was no trial on this summons: *Marwick v. Orton*. (Counsel referred to *In re Fawsitt* (g).) As to item 3: a "conference" is between solicitor and counsel, a "consultation" is between counsel and counsel: Order LXV., r. 27 (45).

Cur. adv. vult.

April 17.

HOLROYD, J. This is a summons to review the taxation of the plaintiffs' bill of costs. The taxing officer disallowed 83*l.* 13*s.* 4*d.* out of a sum of 84*l.* claimed for "instructions for brief," which instructions must evidently have occasioned much trouble and labour to frame. The taxing officer allowed the sum of 6*s.* 8*d.*, which was all he thought he could allow under a particular rule. It seems to be doubtful whether he could even allow that sum. I need not however give an opinion upon the point. The 84*l.* was claimed in respect of an item in the "scale of costs," under a heading of "instructions," and that item is—"For such brief and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence." "Such brief" referred to is the brief

(d) [1894] 2 Ch. 622.

(e) [1898] 23 V.L.R. 462.

(f) [1894] 2 Q.B. 163.

(g) [1885] 30 Ch. D. 321.

in the next preceding item. "For brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before a special referee," and so on. It was objected that neither of these items apply to such a case as the present. The brief in which the sum of 84*l.* was claimed for instructions was used at the hearing of an action commenced by an originating summons, and the question I have now to decide is whether this is such an action as is contemplated under the item "for brief on hearing or trial of action upon notice of trial or notice for judgment given." I think it is not. It is not the hearing of an action or the trial of an action upon notice of trial or upon notice for judgment given. For that reason, I think, it is not contemplated by the item commencing "for brief on hearing," or by the next following item commencing "for such brief and for brief on the hearing of an appeal," and therefore that the taxing officer was right in disallowing the 83*l.* 13*s.* 4*d.* Also, it seems to have been an omission in this "scale of costs" not to have provided for instructions for brief, which may require a great expenditure of time, even when the action is commenced by an originating summons, for very many equity suits are really commenced by originating summons. I speak of "suits" in respect of matters which formerly could have been brought before the Court only by means of an equity suit. For these reasons I think the taxing officer is right.

For somewhat similar reasons I think that the amount of 1*l.* claimed for clerk's fee cannot be allowed, because it has been held that where there is no contest of facts there is no trial and the item in the scale is for "solicitor's managing clerk's fee when there is a trial." I think that the taxation is correct. In this case there was no dispute about facts—it was all a matter of argument. With regard to items 15, 16, 17, and 18 on page 11 of this bill of costs, these were disallowed by the taxing officer because they are claimed as for a conference and the taxing officer did not consider that under the special circumstances of the case a conference was necessary, inasmuch as the originating summons and the affidavit in support of it had been settled by counsel, and for drawing both the originating summons and the

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affidavits, and also for settling the originating summons and affidavit, a fee had been charged; but it appears to me that although these sums have been rejected as claimed in respect of a conference, in point of fact they are claimed in respect of a consultation between counsel, and assuming that to be the case I have not heard any argument as to whether that ought or ought not to be allowed. Assuming it is a consultation, I do not know whether *quid* consultation it can be allowed, and it does not seem to have been argued on that footing before the taxing officer.

Topp—In respect of items 5 and 6, I say they are treated as conferences. It is a matter for the taxing officer's discretion. There is no rule that two counsel shall be allowed on an originating summons.

Weigall—It may be a matter for the discretion of the taxing officer. He has given his reason for exercising his discretion; he may have been misled by looking at the rule which refers to "conferences" and not to "consultations."

HOLROYD, J. I shall send the matter back to the taxing officer to exercise his discretion as to the allowance or disallowance of these items. I ought to add that at first sight I should have considered the previous decision erroneous in another respect. I should have thought that the words "when witnesses are to be examined or cross-examined" in the items in the scale commencing "for such brief and for brief on the hearing of an appeal" should attach both to the words "for such brief" and to the words "and for brief on the hearing of an appeal," and that the 1*l.* 1*s.* or 2*l.* 2*s.*, as the case might be, was a sum which should be allowed for every brief mentioned under the item commencing "for brief on hearing or trial of action," and that the taxing officer had a discretion in cases where witnesses were examined, either on the hearing of an appeal or on any hearing or trial mentioned under the item commencing "for such brief and for brief on the hearing of an appeal," to allow under the special circumstances of any case an additional sum; but I should be sorry to give an opinion as

to that without consulting my brother Hodges. The other point was not brought to his notice, and had not been previously raised.

I disallow the objections to the taxation, except as to the items I have mentioned, which I refer back to the taxing officer for the exercise of his discretion thereon.

On the return of the reference, the taxing officer announced that he had made an error—that the fees were disallowed in respect of a consultation, whereupon the learned Judge refused to allow any costs, but dismissed the summons without costs.

Summons dismissed.

Solicitor for plaintiffs: *T. J. Wyburn.*

Solicitors for defendants: *Major & Armstrong.*

R. H. C.

[PROBATE JURISDICTION.]

IN THE GOODS OF JAMES BUCKLEY.

Practice probate—Document purporting to be will—Absence of attestation clause—Witnesses both dead—Presumption of due execution—Wills Act 1890 (No. 1159), s. 7.

Where a document purporting to be a will and in the handwriting of the person signing it as testator has no attestation clause, but the two persons whose names are subscribed in writing apparently differing from that of the testator and from each other, as witnesses, are dead, such document may be capable of proof as a valid will.

MOTION.

James Buckley died on the 22nd December 1898, leaving personal estate in Victoria not exceeding in value 2,900*l.*, but no real estate. On 4th January 1899 the curator of the estates of deceased persons obtained a rule to administer the estate of the deceased. Alfred William Fergie, the attorney under power of Myra Green, a niece and one of the next of kin of James Buckley, now applied for a rule *nisi* calling upon the curator to show cause why administration should not be granted to him. A document in writing, bearing date 1st January 1877 and purporting to be the last will of James Buckley, was in the

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possession of the curator. The document was signed "James Buckley," and after the signature were the words in the same handwriting as the body of the document, "written by myself." Then followed the words, "As witness—David Hamsworth. As witness—Aquila Roberts." From inquiries it appeared that both David Hamsworth and Aquila Roberts were dead. It did not appear whether either signature was in the handwriting of the person named.

Schutt for the applicant.

On the hearing an objection was taken by the registrar of probates that the document was capable of proof as a will.

Cur. adv. vult.

WILLIAMS, J. This was an application in the estate of James Buckley, deceased, by the attorney under power of the next of kin of the deceased to obtain administration of the estate. An objection to the application was made on behalf of the registrar of probates on the ground that there was a document in existence which purported to be a will of deceased, and the registrar's objection appeared to be founded on this ground—that it was a document capable of proof as a will.

The document in itself is peculiar, and the circumstances of the case connected with its execution are also somewhat peculiar. In the first place there is no attestation clause to the document; the whole of it is in the handwriting of the deceased, and it is signed by him. Although there is no attestation clause there are two attesting witnesses, David Hamsworth and Aquila Roberts, both of whom are dead. Apparently their signatures are not in the same handwriting as the signature of the deceased and apparently differ one from the other. It also appears from the materials before me that no person can be found to testify to the circumstances under which the will was executed. If such a person could be found he might prove that the two attesting witnesses attested in the presence of the testator and of each other. Now the question arises upon that state of facts—Is this a will capable of proof?

and upon reference to authorities and to the text-books I have come to the conclusion that it is, and that the registrar's objection is a good one.

Of the authorities the earliest I can find is *Bourgoyne v. Showler* (a). Dr. Lushington says:—"The question which arises in this case is whether the will of Mr. James Chalcraft . . . is duly executed according to the 9th section of the *Statute of Wills*. Now, on the face of the paper there is the signature of the testator and an attestation clause, which certainly omits to state that the testator signed in the joint presence of the witnesses, and under this attestation clause, and close to it is the name of 'Benjamin Howton, 31 Thayer-street,' and that of 'William Sibley' is immediately under it. The question suggested is this: whether the signature of the testator was made or acknowledged in the presence of both witnesses present at the same time; and the evidence of the two subscribed witnesses has been taken. Now, on what principle ought the Court to consider and decide cases of this description? I apprehend that where a will on the face of it appears duly executed, and there is a clause of attestation of this kind, being not in the strict form, the presumption must be *omnia rite facta fuisse*. However, if the party is put on proof of the will, he is under the necessity of producing the subscribing witnesses, and any other evidence, if there be any other, to establish the fact. In the present case there are only the two subscribing witnesses. If the attesting witnesses had been dead I conceive that the law would presume the will to have been duly executed. If both witnesses had utterly forgotten the transaction I conceive the presumption would also be in favour of the instrument." And in a note to that case it is stated—"On the same day, in *The goods of Prudence Wills, deceased*, where the will exhibited the signature of the testatrix, the names of two attesting witnesses to a clause of attestation not purporting that the will was signed in their joint presence, and the witnesses were unable to recollect whether the fact was so or not, Dr. Lushington expressed himself as follows:—"I apprehend that where there is an attestation clause of this

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(a) [1844] 3 N.C. 201, at p. 204.

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description, and the names of two witnesses, and the signature of the testatrix, the presumption, in the absence of all evidence, is that the will was duly executed according to the statute. If the witnesses are unable to recollect anything of the transaction this presumption ought to prevail.’”

Again, in *In the goods of Luffman (b)*, Sir H. Jenner Fust says—“It is quite clear from the circumstances that it was not intended to revoke the former paper. With respect to that paper, the attestation clause being defective, and the subscribed witnesses not forthcoming, the question is, whether it can be considered as having been duly executed by the deceased. According to the statute ‘no form of attestation is necessary,’ and probate would have passed but for the rule of the Court (a very wholesome rule) that where there is an imperfect attestation clause there should be an affidavit by the attesting witnesses as to the due execution. It could never have been the intention of the deceased to misrepresent the fact by signing the names of the two witnesses herself. It is an unfortunate circumstance, but, the paper being in the form of a will, and having the names of two witnesses subscribed to it, and, notwithstanding all possible steps have been taken to obtain their evidence, they are not forthcoming, can the Court refuse to grant probate of the paper? I think it cannot. Suppose the witnesses were dead? I am of opinion that the Court must accept this as proof *prima facie* of the due execution of the will.” Then in *In the goods of Dickson (c)* the same judge says:—“The paper purports on the face of it to have been duly executed, being signed by the deceased, and the names of two witnesses are subscribed to it, as attesting the execution, but as to who they are no information can be obtained, and notwithstanding every inquiry they are not forthcoming. Now the Act requires that the will should be signed by the testator in the presence of two witnesses, who are to attest the same, and here are the names of two witnesses affixed to the paper, and there is no reason to suppose that this is a fictitious case, and that they were not persons present at the time of execution. The Court has laid down a rule for the protection of the interests of

(b) [1847] 5 N.C. 183, at p. 185.

(c) [1848] 6 N.C. 278.

parties where the clause of attestation is imperfect—as in this case, where there is only the word ‘witnesses’—to require an affidavit from the witnesses that the will was duly executed according to the requirements of the Act. But this is a mere rule of the Court for the security of parties themselves, and in this case the parties who would be prejudiced consent to the administration. Under the circumstances I think the Court is not at liberty to refuse the motion.” In a later case, *In the goods of Thomas (d)*, Sir C. Cresswell says:—“The question in this case was whether probate should be granted of a will to which there appeared to be three attesting witnesses. when one of those witnesses, the only one who survived the testatrix, made an affidavit to the effect that when he witnessed the execution of the will no other person was present, and when no information could be given with respect to the circumstances under which the other two witnesses signed it. Upon consideration I think that I may fairly presume that the will was duly executed, for the following reason:—Franklyn, the surviving witness, deposes that when he witnessed the execution of the will by the testatrix he explained to her that the presence of another witness was requisite. Therefore, when I find the signatures of *two* other witnesses, not the signature of *one* other only, I think it may be presumed that the testatrix had understood from Franklyn that the *joint* presence of two witnesses was necessary, and that acting on his suggestion she acknowledged his signature in the *joint* presence of the other two persons whose names are subscribed.” Referring to the text-books, there is a passage in *Williams on Executors* (9th ed.), vol. i., 272, to which counsel has very properly drawn my attention:—“If there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed ceremonies, an affidavit is required from one of the subscribing witnesses, by which it must appear that the will was executed in compliance with the statute. But this rule may be dispensed with if the witnesses, after diligent inquiry, are not forthcoming.” And in *Tristram and Coote’s Probate Practice* (11th ed.), p. 86, it is stated:—“The practice under these circumstances

(d) [1858] 28 L.J. P. & M. 33, at p. 34.

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is defined by the 7th rule, 1862" (of course we have not got that rule here, but it is a rule of practice and will be followed in our courts) "which directs that:—'If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact, and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.'" And further on, in the same volume, at pp. 660, 661, Appendix V., Forms 5, 6, and 7 show the form of affidavit required in each particular case—viz., as to the death of attesting witness, or of handwriting, and so on.

Now, applying these authorities to this case—it falls within the principles of the authorities—it can be proved that the whole will is in the handwriting of the deceased, that the signature is his, that the two attesting witnesses are dead, and I have no doubt that it can be proved that after careful inquiry no other person can be found to testify to the circumstances under which the will was executed. It may be proved that the signature of these two persons, Hamsworth and Roberts, are in their own handwriting. By diligent search I think this fact may be proved, or even if it cannot it should be investigated, and it may be proved that one is, and that the handwriting of the other is different from it, in order to show it is not by that person. If that is proved I think this document, peculiar as it is, may be admitted to probate. On these grounds I think the registrar is right. I refuse the application, but without prejudice to a fresh application.

Schutt—I ask for costs. The curator now holds under an intestacy. If the will had been found before this, application would have been made earlier.

WILLIAMS, J. I give no costs.

Solicitor for applicant: *A. W. Fergie.*

R. H. C.

NALLY v. WALSH.

[1898—No. 860.]

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March 10.Madden, C.J.

Practice—Trial by jury—Costs—Joinder of claims—Previous action—“ Rules of Supreme Court 1884 ”—Order LXV., s. 1.

The fact that a plaintiff in an unsuccessful action by himself and his wife for damages for injury failed to add his personal claim for damages, and in a subsequent action against the same defendant recovered a substantial amount in respect of that claim, may be a sufficient reason for depriving the plaintiff of the costs of the second action.

A. and his wife brought an action against B. for damages in respect of an injury caused by the latter's negligence. The jury gave a verdict for defendant. Subsequently A. brought an action against B. in respect of the same subject matter for injury caused to A. personally. The jury awarded him substantial damages.

Held, that A. was entitled to costs, but that the costs of the defendant in the first action should be taxed as between solicitor and client, and should be set off against the costs of the latter action.

MARY Nally, a married woman, was injured in an accident caused by the alleged negligence of Julia Walsh. Mrs. Nally and her husband James Nally joined as plaintiffs in an action against Julia Walsh for the recovery of damages by reason of the latter's negligence in causing the accident. James Nally did not in that action add any claim in respect of any alleged injury done to him by reason of the accident. The action was tried in the County Court, and eventually, after prolonged litigation, was decided against the plaintiffs, with costs. James Nally, after the conclusion of this litigation, instituted an action against the same defendant for damages sustained by him in respect of the injury done to himself. This action was tried before Madden, C.J., and a jury of six, on 6th, 8th, 9th and 10th March 1899. The jury gave a verdict in favour of the plaintiff for 75*l.* 15*s.* damages.

On the question of costs,

Dr. McInerney for the plaintiff.

F. Gavan Duffy for the defendant.

Cur. adv. vult.

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MADDEN, C.J. It is quite certain that one of the best innovations in procedure introduced by the new Judicature system is to provide that litigation in any given case shall be narrowed in its issues as much as possible for the saving of costs. One of the processes by which it seeks to achieve this object is that where certain causes of action can be joined together in one action they shall be so treated. While that is so, and while this is the desire of the Legislature, to make the rule effective in all cases might do very great injustice, because there are cases in which justice might possibly be defeated, or at all events greatly disadvantaged, if two separate causes of action were tried in one. If a litigant does not join together all his causes of action against another in the one suit, he places himself in peril to this extent, that when he comes to trial he may be deprived of costs, or even have to pay the costs of the other side. It may, however, appear that he had every reason to keep the actions apart, and then, of course, the Court will not deprive him of costs. The rule of law is that a person who has two causes of action should add them for the purpose of saving costs. In this case Mrs. Nally was hurt in an accident, and her husband went to see a solicitor in the matter. He and his wife were joined in an action for the purpose of recovering damages. In that action the husband was entitled to add a claim in respect of the injury to himself, but he did not add that claim. That case went unfortunately through a long course of litigation, and was ultimately decided against Mrs. Nally, with costs. Then, after that final decision was given, Nally saw his solicitor and said he supposed he was beaten now, but the solicitor told him he could sue, and thereupon a new action was instituted. The result has been that Nally wins his action, though Mrs. Nally loses hers. I feel no doubt that Nally was going against the spirit of the law when he delayed instituting the action in which he now succeeds, instead of joining in his wife's action. Incidentally I may say that there was nothing in the *County Court Act 1890* to prevent his adding his cause of action to his wife's. He has distinctly sinned against the spirit of the law. It is said that he is ignorant of the law, but he is liable for what his solicitor does. If his solicitor chooses not to add his claim, but to bring another

action at an inappropriate time, he is responsible. There is no other possible way by which the law can be vindicated. In my opinion the solicitor ought in this case to have told the plaintiff as to his own claim what were his legal rights. He should have told him that he had a cause of action and could try it, otherwise it is manifest that if he were permitted to try one cause of action after another costs would be increased intolerably. Therefore I have no doubt that Nally has erred against the spirit of the law. I think that counsel's argument is true, that the rule is not to be enforced merely as the law's resentment against a man's technical non-observance of the law, but that the Court should see that at the last substantial justice is done between the parties, having regard to all the circumstances, including the plaintiff's error. I am not prepared to make him pay the costs of the whole litigation. It is a rule which is intended to be restricted. The Court is to do substantial justice, using the wide discretion given to it. Nally had a very substantial ground of complaint. He has recovered a substantial amount of damages, therefore I think he has vindicated his right to have an action, and therefore *prima facie* he had a perfect right to litigate. I do not think that in this case I should make him pay the costs of the unsuccessful defendant. It appears to me that it is proper that before Nally gets away with any costs he should first reimburse the defendant all she has lost in respect of the former action—that is, 20*l.* 15*s.*; also, he must reimburse the defendant the costs of the defendant as between solicitor and client, which the taxing officer has to tax, having regard to the fact that they have to be paid by a third person. I direct judgment to be entered for the plaintiff for the amount of the damages given—75*l.* 15*s.*, with costs, to be taxed. I direct also that, in addition to the said taxation, the defendant's costs, so far as the same relate to charges recoverable usually as costs, be taxed as between solicitor and client only, and exclusive of all costs between party and party as a special taxation, having regard to the fact that the costs so taxed would have to be paid, not by defendant, but by a third party, and that such last-mentioned costs so taxed be paid by the plaintiff to the defendant, and that the costs directed

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to be paid by the parties respectively be set off the one against the other, and, if the costs found on taxation to be due from the plaintiff to the defendant be less than were due by the defendant to the plaintiff, then that the defendant be at liberty to deduct such balance from the amount due the plaintiff for damages under the judgment, and that the sum of 20*l.* 15*s.* due by Mary Nally to the defendant for the costs of the former litigation be set off against the amount due by the defendant to the plaintiff, and the balance to be paid by the party in whose favour it is found.

Solicitors for the plaintiff: *McInerney & McInerney.*

Solicitors for the defendant: *Gaunson & Stewart.*

R. H. C.

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April 19.

Holroyd, J.

[PRACTICE COURT.]

REGINA v. SCHULTZ, *EX PARTE* AH LING.

Imprisonment of Fraudulent Debtors Act 1890 (No. 1100), ss. 22, 25, Schedule IV.—Debtor's summons—Neglect of debtor to appear—Evidence—Obtaining credit by fraud.

Where on the return of a debtor's summons the defendant does not appear, and the hearing is adjourned to a date of which the defendant has notice, and the defendant does not appear at the adjourned hearing, an order may be made against him in his absence.

Where a purchaser of goods undertook to pay for them on delivery, but having obtained delivery by a fraudulent stratagem without payment, promised payment on a future date, and on that date gave a valueless cheque,

Held, upon a summons under sec. 22 of the *Imprisonment of Fraudulent Debtors Act 1890*, that the justices were entitled to find from these facts that the defendant obtained credit by means of fraud.

ORDER TO REVIEW.

The judgment of Holroyd, J., sets out the facts sufficiently.

Herbert Barrett to move the order absolute.

Cussen to show cause.

Counsel referred to *Regina v. Shelley, ex parte Jones (a)* and *Reid v. Jones (b)*.

HOLROYD, J. The first ground upon which the defendant obtained the order *nisi* was that the court of petty sessions had

(a) [1883] 9 V.L.R. L. 297.

(b) [1893] 14 A.L.T. 234.

no jurisdiction to make any order in the absence of the defendant. The defendant was summoned to appear in the first instance on the 7th February 1899 at the Court of Petty Sessions at Coburg, to be examined by the Court (as it runs) "touching your estate and effects and as to the property and means you have of paying the said sum" (that is, the sum for which an order of payment had been made against him in the previous May), "and as to the disposal you have made of your property and as to your intention to leave Victoria without paying the said sum or to depart elsewhere within Victoria with intent to evade payment and as to the mode in which you incurred the liability." That summons is in the Form 1 of Schedule IV. to the *Imprisonment of Fraudulent Debtors Act* 1890. Sec. 22 of that Act provides that certain orders which are therein specified shall not in default of distress or otherwise be enforced by imprisonment, unless one or more of certain charges also specified in the said section is or are proved to the satisfaction of the Court. The section then proceeds to enact that proof of any of the above mentioned matters may be given in such manner as the Court to whom application is made for the commitment of the debtor to prison may think just, and for the purposes of such proof the person making default may be served with a summons in the form in the 4th schedule, and may be examined on oath on the return thereof as to any of the matters hereinbefore mentioned and set out in such summons, and any witnesses may be summoned and examined on oath according to the provisions relating to the summoning and examination of witnesses in cases of summary jurisdiction. The section proceeds:—"If any of the aforesaid matters be proved to the satisfaction of the Court the Court may if it think fit make an order in the form in the 4th schedule to this Act or to the like effect that unless the person making such default shall pay to the clerk of petty sessions either forthwith or within the time or times limited in such order the money so unsatisfied either in one sum or by such instalments as may be ordered together with such costs of and occasioned by such summons and examination as shall be directed by the order he shall be committed to prison for any time not exceeding two months."

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Now, the Act evidently contemplates that the party desirous of enforcing any one of the orders specified in sec. 22 by means of imprisonment, may issue the summons in the form in Schedule IV. calling upon the debtor to present himself to be examined on the matters therein mentioned or any of them, and that when that summons is heard he may prove his case either by examining the debtor on oath or by examining other witnesses. I see nothing in this section to say that he must examine the debtor at all. If he prove his case by other witnesses, he is entitled then to obtain an order in the 4th schedule to the effect that I have already mentioned.

In this case the debtor was summoned ; the summons was adjourned ; he had notice of the adjournment. No objection was taken that he had not received proper notice of the adjournment, or that the case was coming on. He did not appear. He was also required to attend as a witness. This seems to me to make very little difference. But he did not appear on the summons. He could not therefore be examined.

Even if he could have insisted upon being examined being present, nevertheless as he did not appear he could not have been examined. He might, it has been urged, have been committed for non-compliance with the summons, but it was not necessary that the creditor should proceed to that stage. He had the right to get his order on other evidence, and the justices could make the order, if they thought the evidence supported the charge. It appears to me that sec. 25 has no bearing upon this case. It merely provides that the examination of the person summoned as I have described "*and of all other witnesses examined in the matter shall be taken down in writing and a copy thereof may be used on the hearing of any appeal from or of any order to review any order of commitment.*"

That simply means that the examination of any witnesses, including the debtor himself, should be taken down in writing when they are examined. When they are not examined their evidence cannot be taken down. It is no more necessary that the creditor should examine the debtor than that he should examine any witness whom he has summoned but not thought proper to call.

The only other ground on which the order *nisi* was obtained and relied upon by the debtor is that there was no evidence to support the allegation of fraud. The evidence of Henry Schultz is this—so far as it bears upon the question:—"The defendant, Ah Ling, shortly before the 24th December 1897 came to me and spoke about buying some pigs and I agreed to sell them to him for 48*l*." There was an agreement apparently concluded. "I said to him he could pay for them before I put them on the cart." The agreement was for cash. "He said he would be present at the delivery of them, and would pay for them then. He could not have thought I was selling them on credit. He did not ask me for credit, and I insisted I should have cash. I instructed my son to obtain payment before delivery of the pigs." Now that first of all seems to have been a sale for cash then and there. And then it was stipulated that the pigs should be paid for on delivery. I take it that the contract itself was payment on delivery, and not for cash then and there. I cannot see that the Chinese had up to this time obtained credit by fraud, unless it be fraud to induce a man to enter into a contract for payment on delivery at a future date, when he first of all desires to be paid cash down. It is different when we come to consider what happened afterwards. Ah Ling said he would be present at the delivery of the pigs, and would pay for them then. Schultz contracted that his son would deliver the pigs on payment of cash for them. The son states that Ah Ling told him he would meet him at the garden gate, where he had to deliver them, and pay him for them. Ah Ling said he would be there. The son's evidence proceeds:—"I took the pigs in the cart to the defendant's place." Then, as he says, he left the cart on a good part of the road and went to see if Ah Ling had got the money. When he returned he found Ah Ling leading the horse and cart with the pigs into a piece of bad road close by. Ah Ling pulls the cart into a hole nearly up to the axle, so that it becomes impossible to get it out without unloading the pigs. This young Schultz would never have done but for the stratagem of Ah Ling. He then asks Ah Ling for payment, and Ah Ling tells him a story about having had to get a doctor and his inability to get the money; but promised to pay the money on the following

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Saturday. This is a distinct statement by the Chinese that he had had a doctor and would give the money on the Saturday. Young Schultz cannot get the pigs loaded upon his cart again, and cannot therefore take them back with him. Ah Ling, taking advantage of this, drives the pigs off. The young fellow goes home, being satisfied for the present with the promise that he would get the money on the Saturday, and also being placed in the very difficult position of being unable through Ah Ling's treachery to restore his father's property. When he goes back he is told by Ah Ling that he cannot have his pigs because they are killed. He is again promised his money on the Saturday. On the Saturday he is given a valueless cheque. On the whole of the facts, were the justices entitled to say that Ah Ling had obtained credit by means of fraud? The credit he obtained was certainly from the date on which the boy brought the pigs. If the lad had been induced to deliver the pigs to Ah Ling without getting payment for them by Ah Ling's false statement that he had been to the doctor, and had not been able to get the money, but would pay him on the Saturday, I am inclined to think that there would be evidence to go to the justices that he had obtained credit by fraud. But this is a much stronger case. It was fraud to put the cart into the mud and by that means to compel the lad against his will to leave the pigs in the possession of Ah Ling. That was a deliberate fraudulent stratagem by which he got the pigs into his possession without paying for them. Combined with this was the lying statement which induced the boy to leave them where they were, because he might have gone for a policeman in order to get his pigs back. He was certainly induced by stratagem, and by the promise to give the money on Saturday, and therefore I think the justices were justified in coming to the conclusion that he had obtained credit by fraud, and that the order made against him was a proper one.

The order *nisi* will therefore be discharged, with costs.

Order discharged.

Solicitors for the complainant: *Farlow & Barker.*

Solicitor for the defendant: *Field Barrett.*

R. H. C.

[IN CHAMBERS.]

DALE v. NELSON.

[1899. No. 42.]

1899
April 26.Holroyd, J.

Practice—Pleading—Defence arising after pleadings closed—Amendment—“Rules of Supreme Court 1884”—Order XXIV., r. 2—Order XXIII., r. 2—Order XXI., rr. 11, 12, 13.

A defendant may not after the pleadings in an action have closed deliver a further defence by way of counterclaim without leave of the Court, even although the new matter was pleaded by defendant within eight days of its discovery by him.

A defendant in an action for slander, and after the pleadings had closed, delivered, without leave, a “further defence by way of counterclaim,” claiming against the plaintiff and a third party for rent and for money lent. Upon summons to strike out this pleading as embarrassing,

Held, that such a pleading was embarrassing and should be struck out.

Sander v. Sundercombe (11 A.L.T. 70) applied.

SUMMONS on behalf of a plaintiff to strike out a further defence delivered by way of counterclaim.

The action was one for slander. The defence consisted of a denial of the words alleged. The reply was delivered on 24th March 1899. The pleadings were closed on the 30th March. On 17th April the defendant delivered what was termed a “further defence by way of counterclaim,” demanding from the plaintiff and another person a certain sum of money for rent and for money lent upon the security of a promissory note endorsed by the plaintiff and made by the other person.

Eagleson in support—This further pleading is embarrassing : Order XIX., r. 27. The pleadings are closed. The plaintiff cannot under the rules reply to this counterclaim. Order XXIV., r. 3, simply applies where judgment is confessed. Leave has not been granted to put in the pleading : Order XXIII., r. 2 ; *Sander v. Sundercombe* (a).

[HOLROYD, J. I cannot understand why this new matter could not be raised by way of amendment of the pleadings, and why leave should not be asked for. I do not understand the rule for delivery of a further defence in place of amendment.]

Dr. McInerney for the defendant—Order XXIV., r. 2, has been followed in this case. The matter now pleaded as a further defence by way of counterclaim could not have been

(a) [1889] 11 A.L.T. 70.

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pleaded before. The promissory note sued upon fell due after delivery of reply. The pleading is delivered within eight days of the discovery by the defendant of the facts set out. This is not an amended defence; it is a "further" defence. No leave to plead was necessary. The third person, not a party, has been served with a copy of the pleading: Order XXI., rr. 11, 12, 13, 14.

[HOLROYD, J. It all comes back to this, that the pleadings are closed and cannot be opened. If they can be, there should be some application made to the Court for leave. The Judge would have to go into the facts, and good cause would have to be shown. Here there is simply a document which is alleged to have been delivered within eight days. No one knows whether it was delivered within the eight days or not. It is treated as if the whole thing could go on and arrange itself properly. I do not see how it can. It would be more convenient for the defendant to bring an action separately in respect of this matter.]

It is in the nature of the old common law pleading, *Puis darrein continuance*. There is no need to apply to the Court.

HOLROYD, J. There is something more in the case of *Sander v. Sundercombe*. Short as it is, it says the application is to be made by summons, supported by affidavit as to the truth of the matter sought to be pleaded, and also as to when it arose. Surely that affidavit ought to be supplied, whether the pleading is delivered within eight days or subsequently. The reason why an answer under the old system could be amended was that the defendant could not deliver it except it was true, and the time of delivery had to be truly stated. I think this pleading is sufficiently embarrassing. The pleadings in the action are closed, and the delivery of this document does not open them. Therefore I must strike out this pleading as irregular. Rule 2 of Order XXIV. is a difficult one to construe, but this is my opinion. I grant the application, with costs.

Application granted.

Solicitors for plaintiff: *Westley & Dale*.

Solicitors for defendant: *McInerney & McInerney*.

R. H. C.

[IN CHAMBERS.]

HINTZE v. HINTZE; RUHE, CLAIMANT.

1899
April 17.

Practice—Interpleader—Insolvency of judgment debtor—Costs—“ Rules of Supreme Court 1884 ”—Order LVII., r. 15—Order LXVII., r. 11—Insolvency Act 1890 (No. 1102), s. 76.*

Holroyd, J.

Where proceedings upon an interpleader summons are stayed by virtue of the judgment debtor's insolvency no order as to costs will be made on the return of the summons.

INTERPLEADER.

A sheriff's interpleader summons was issued returnable on the 14th April 1899. On the 12th April 1899 the judgment debtor became insolvent.

Application was now made that the execution creditor should pay the sheriff's costs.

The managing clerk to the sheriff's solicitor in support—In *Martin v. Nicholls (a)* and *Union Bank v. Jarrett (b)* no order as to costs of the summons was made, but the question does not appear to have been argued.

On the question of previous costs: Order LXVII., r. 11. Here the sheriff has acted *bond-fide*, and there is jurisdiction to allow him his costs: *Mackintosh v. The Lord Advocate (c)*; *Great Northern and L. and N. W. Railway Joint Committee v. Inett (d)*. The execution creditor starts the proceedings.

[HOLROYD, J. The execution creditor and claimant have ceased to be parties to the interpleader order. I am not sure that even in principle the case last cited covers the present one. Apart from that, in these proceedings no wrong step has been taken by anyone.]

The execution creditor is to get the benefit of the execution. He institutes the proceedings.

[HOLROYD, J. It often seems to me unfair that the execution creditor should, when beaten, have to pay costs in regard to a matter of which he generally knows nothing. Sec. 76 of the *Insolvency Act 1890* stays all proceedings. I do not see how the summons could go on.]

Order LVII. is in my favour.

(a) [1891] 12 A.L.T. 190.

(c) [1876] 2 App. Cas. 41.

(b) [1893] 14 A.L.T. 238.

(d) [1877] 2 Q.B.D. 284.

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R. Kelly for the execution creditor was not heard.

HOLROYD, J. I am not disposed to make any further order than that which was made respectively by my brother judges, Hodges and A'Beckett, JJ., in the cases of *Martin v. Nicholls* and *Union Bank v. Jarrett*.

Solicitor for the execution creditor : *R. Kelly*.

Solicitors for the sheriff : *Gillott, Bates & Moir*.

R. H. C.

1899

May 8.

Williams, J.

[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

[IN CHAMBERS.]

ZANONI v. ZANONI.

Practice—Divorce—Costs of wife—Payment into Court—Jurisdiction—Marriage Act 1890 (No. 1166), s. 111.

It is not necessary in order to compel the payment into Court, under sec. 111 of the *Marriage Act 1890*, by a husband of a sum of money not exceeding 20*l.* that a preliminary order for the payment by him of 5*l.* under the section should have been made.

Where a husband neglects to pay into Court under the section the sum fixed by the taxing officer, a summons to compel him to do so may be taken out, but this should be done promptly.

Jackson v. Jackson (2 *Argus* L.R. 224) explained.

APPLICATION on summons under the provisions of sec. 111 of the *Marriage Act 1890* on behalf of a wife, respondent in a suit for dissolution of marriage, for an order that the husband pay into Court a sum not exceeding 20*l.* for her costs. Zanoni instituted a suit for dissolution of his marriage with his wife upon the ground of desertion. The respondent entered an appearance on 11th January 1899, and delivered her answer on 16th February. Notice of trial was given on 14th March. The suit was in the list of causes for trial in May and should have been heard on the 7th May, but Williams, J., adjourned the hearing for two days in order that the present application might be made. The respondent had not asked for the sum of 5*l.* to have her case investigated. The respondent's proctor filed a certificate under sec. 111 upon 23rd April 1899.

Wanliss for the applicant referred to sec. 111 of the *Marriage Act 1890*.

The managing clerk for petitioner's solicitors to oppose—The section does not say that the costs of the preliminary investigation are to be paid into Court.

[WILLIAMS, J. Why should not the respondent pass by the first stage of the section? It is all the better for the petitioner.]

The only order she may have is one that the husband is to pay 5*l.*, to enable the respondent to have the merits of her case investigated by a proctor. That being done, or whether done or not, why should not the proctor for the respondent file the certificate that he has investigated the merits of her case, and then the prothonotary will fix the amount. In the first part of the section the preliminary order is one entirely in the Court's discretion; the order in the second part is one which the Court must make. If the second order is made then neither party has any standing by which he can show cause against the order. In the case of *Jackson v. Jackson (a)* it was held by your Honor that there was no necessity to apply for this order at all.

[WILLIAMS, J. Suppose a Judge does not make any order, and the husband does not pay, then the wife is obliged to come to the Court for an order to compel him to do it. I do not think in the first case the Judge has to make an order.]

In a subsequent case, *Jose v. Jose (b)*, Hodges, J., disagreed with that view.

[WILLIAMS, J. The learned Judge does not take a different view in that case. I quite agree with him; but the Act does not contemplate a Judge making an order in the first instance. If a husband does not pay into Court then application may be made to the Court for an order. I do not see any distinction between the cases. My difficulty is this—I do not see why a respondent should not miss the first stage altogether. Suppose the proctor investigates a case of his own motion and files the certificate, why should he not go on then? The strongest point in your favour is the meaning of the words "The Court if it considers she has not sufficient separate estate may order," etc. In may be that these words govern the whole section. It may

(a) [1896] 2 *Argus* L.R. 224.

(b) See note to page 942.

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be said that the Court has not considered whether the respondent has sufficient separate estate or not.]

As to the merits—

[WILLIAMS, J. Why should not the proceedings be stayed.]

In *Jackson v. Jackson* application was made at the trial, and your Honor reserved judgment and ordered the trial to proceed. The application here has been made too late. It would not be proper now to stop the case. There has been three months' delay. The petitioner has no property.

WILLIAMS, J. I think in this case of *Jackson v. Jackson*, as reported in the *Argus* Law Reports, the headnote is to some extent misleading. It runs:—"The Court has no jurisdiction to make an order for the payment into Court by a husband of a sum which has, under sec. 111 of the *Marriage Act* 1890, been fixed by the taxing officer to be so paid." That is right enough, but is calculated to mislead. What was said was that *in the first instance* the Act does not contemplate a Judge making any order at all. The judge has no right to make the order; but if the Act is not complied with, the condition of things becomes different. That question did not arise in *Jackson v. Jackson*, it does arise here. I see no conflict between my decision in *Jackson v. Jackson* and that of Hodges, J., in *Jose v. Jose*. I reserve judgment, following the same course as before. This application should be made promptly. The case would have come on for trial to-day but for my order. I shall not for the present interfere with the case.

Solicitors for the petitioner: *Strongman & Crouch*.

Solicitors for the respondent: *Hughes & Permezel* (for *T. N. Whyte*, Geelong).

R. H. C.

1898

August 15, 17.

(b) [DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

JOSE v. JOSE.

Hodges, J.

Practice—Divorce—Costs of wife—Payment into Court—Jurisdiction—Marriage Act 1890 (No. 1166), s. 111—Certificate—Counsel—Partner—"Rules of Supreme Court 1884"—Order LXV., r. 27 (16).

Although there is jurisdiction under sec. 111 of the *Marriage Act* to make an order for payment into Court by a husband of the sum to be fixed by the taxing

officer for his wife's costs, a Judge will not do so until the sum has been fixed and the husband has neglected to pay.

A member of a firm of solicitors may be instructed by a partner and may be certified for as counsel.

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Williams, J.

APPLICATION on summons on behalf of a wife, party to a divorce case, for an order under sec. 111 of the *Marriage Act* 1890, directing the husband to pay into Court a sum of money in order to enable the wife to have the merits of her case investigated by a proctor, and that the husband also be ordered to pay thereafter into Court the sum of 20*l.*, or such sum as should be fixed by the taxing officer. The summons also asked for alimony *pendente lite*.

L. S. Woolf for the husband to oppose—There is a preliminary objection. The Court has no jurisdiction at this stage to order 20*l.*, or a sum to be fixed by the taxing officer, to be paid into Court; this part of the summons cannot be granted : *Jackson v. Jackson* (2 A.L.R. 234).

McKean for the applicant referred to *Bartlett v. Bartlett* ([1894] 1 A.L.R. 94; 16 A.L.T. 6.)

The summons was then heard on the merits.

HODGES, J. In this case I propose to make orders for the preliminary expenses, 3*l.* 3*s.*, the usual amount. With regard to the alimony for the wife and the maintenance for the children, I should say 15*s.* per week for the wife and 10*s.* per week for the children. With regard to the other matter, I wish to consider it.

McKean, as to costs, asked for the usual certificate for counsel.

HODGES, J. Who is the solicitor on the record? Are you instructing yourself?

McKean—Mr. A. H. McKean, my partner, is the solicitor, and instructs me.

HODGES, J. I must consider that matter also. It raises an important question of practice, which ought to be settled.

Cur. adv. vult.

HODGES, J. In this case I reserved two questions for consideration. The first is whether the Court ought now to make an order directing 20*l.*, or such sum as may be fixed by the taxing master, to be paid into Court. A number of decisions, apparently conflicting, were cited before me. I propose to say a few words on the section without regard to the authorities. The first part of the section empowers the Court to make an order for the setting aside a sum of money for the investigation of the case. That is the case in which the Court is to make an order. Then the section goes on to say—"and such sum or part thereof may on the certificate of the Taxing Master be paid to the wife or her proctor on such Master being satisfied that such sum has been properly incurred or spent in ascertaining whether the wife has a good cause of suit or defence on the merits thereof." So that, in the first place, there is the order providing for a sum of money for her to have the case investigated by a proctor, and then the proctor does the next thing—"and if after investigating the case the wife's proctor is of opinion that she has a good cause of action or defence on the merits he may file a certificate to that effect in the office of the prothonotary and thereupon," requiring no further order, "the husband shall pay into Court a sum not exceeding 20*l.* to be fixed by the Taxing Master." The Taxing Master has to

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fix the sum, and then that sum is to be paid into Court. It seems to me that the Court should not order that sum to be paid in until the Taxing Master has fixed the amount, and that it ought not to be ordered at this stage. At any rate, the Legislature does not seem to have contemplated that the Court should now order the husband to pay in a sum which the taxing officer shall think proper to fix, but that, in the first instance, the Taxing Master should fix the amount, and then it is the duty of the husband to pay into Court. If he does not, then I think it would be proper that the Court should make an order. I think if the authorities were examined, none of them would be found to be inconsistent with this view. There is a jurisdiction in the Court to direct the sum to be paid, because the statute says it is to be paid, and I think the Court could say "What the statute orders you to pay you must pay, and we direct you to pay," and then there could be an application for attachment in case the husband did not pay. I think the order can be made, but it is a question at what time it should be made. The time for making the order in this case has not arrived, and therefore I make no order.

Then the next question which I reserved was, whether the gentleman who appeared to argue this summons for the wife was entitled to a certificate for counsel. It appeared that the counsel who argued the summons on behalf of the wife was instructed by his partner, and that being the case he asked for a certificate for counsel. I had some doubt as to whether I should make the order, seeing the complications that might arise if this sort of thing were done systematically, and seeing that, where one solicitor instructed his partner, it would be possible for the one to carry the whole matter through, using his partner's name as the attorney on the record, and doing the whole of the work himself. But while it is open to that abuse, the Legislature seems to contemplate the instructing of a solicitor as counsel by his partner. Sec. 6 of the *Legal Professions Act* 1891 seems undoubtedly to contemplate that, because it not only contemplates such a case, but also what may be the consequences in such a case. It provides—"No barrister or solicitor shall be entitled to any costs whether as between party and party or between solicitor and client for instructions to or attendances upon counsel he or his partner or partners being such counsel or for attendances at Court on trial or in chambers as solicitor where he or his partner or partners shall be also acting and receiving a fee as counsel for the like attendance and for the same client." That is a clear intimation by the Legislature that, although the barrister and solicitor is to get his fee as counsel, yet there is not to be charged against the client or the opposite party a fee for attendance on himself or for attendance by his partner. The Legislature thus contemplates an attorney being instructed by his partner, and points out the consequences in such a case. Although that matter may be and is liable to abuse, it is for the Legislature to set aside such a practice, and not for the Court to attempt to set it aside, and thus to defeat the intention of the Legislature. I shall therefore in this case give the certificate for counsel, and fix the costs at 3*l.* 3*s.*

Solicitor for the husband : *D. Gaunson.*

Solicitor for the wife : *A. H. McKean.*

R. H. C.

[PROBATE JURISDICTION.]

IN THE WILL OF MARY BUCKLEY.

Practice probate—Order nisi—Evidence—Affidavit—Administration and Probate Act 1890 (No. 1060, sec. 22).

1899
May 17.
Hodges, J.

Where on the return of an order *nisi* for probate the caveator does not appear the order may be made absolute, subject to an affidavit of service, without *vivâ voce* evidence being given.

ORDER *nisi* for probate.

William Primrose Anderson, the executor of the will of Mary Buckley deceased, applied to the Registrar of Probates that probate of the will should be granted to him. The estate was valued at 100*l.* realty and 15*l.* personalty. Margaret Buckley, a daughter of the testatrix, on 13th September 1898 filed a caveat against the grant. The order became returnable on the 13th April, and was then put into the list of causes for hearing. The case was now called on. The caveatrix appeared on the return of the order *nisi*.

Cussen for the executor.

No appearance for the caveatrix.

Cussen—I ask the Court to make the order for probate absolute. The Court may act upon the affidavits filed, and without further evidence grant probate: *Administration and Probate Act* 1890, sec. 22. The general rules do not affect the procedure under the section: Sec. 14.

[HODGES, J. Has an affidavit of service been filed?]

No. The order for probate may be made to run thus:—
“Upon reading these affidavits, leave being given to use the same, and no application having been made to cross-examine the deponents, the order *nisi* was made absolute.”

HODGES, J. It is a small estate, and I am anxious to save costs. I think the *Administration and Probate Act*, sec. 22, entitles me to make the order absolute in this case, and to grant
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probate, subject to the filing of an affidavit of service. The order will be absolute, with costs.

Order absolute for probate.

Solicitors for executor: *Crisp, Cameron & Rennick* (for *Lyne & Silvester*, Portland).

R. H. C.

1899
April 26.
Holroyd, J.

[IN CHAMBERS.]

IN RE JOHN FERDINAND PFEIL; IN RE CRISP, LEWIS AND HEDDERWICK.

Will—Executor—Solicitor—Trusts and powers—Charges.

By his will a testator declared that one of his executors, a solicitor, should, in addition to a commission, be allowed, not only his usual professional charges, but also a proper remuneration for all business done, and all attendances, time, and trouble in and about the execution of the trusts and powers of his will, whether the business was usually within the province of a solicitor or not.

Held, that by the words "trusts and powers" the testator meant only those trusts and powers which are expressly declared by his will, whether they would be duties attaching to an executor by virtue of his office or not.

REVIEW OF TAXATION.

John Ferdinand Pfeil, of Gisborne, by his last will, dated 19th May 1897, appointed Robert Edward Lewis, of No. 414 Little Collins-street, Melbourne, solicitor, and William Henry Cooke, of High-street, Prahran, grocer, "executors of this my will and trustees of my estate." The will then continued:—"I direct that the trustees or trustee acting in my estate shall receive a commission of two pounds per cent. on all income and one pound per cent. on the probate value of my estate. I give devise and bequeath all my real and personal estate whatsoever and wheresoever and all my rights assets credits and effects unto and to the use of the said Robert Edward Lewis and William Henry Cooke their heirs executors administrators and assigns but upon the trusts following namely to collect and reduce into money all my personal estate and to sell such part of my real estate as may be necessary to pay off all charges on the said real estate and all my debts funeral and testamentary expenses and the legacies bequeathed by this will.

And to make any such sales by public auction or private contract for cash or on credit and subject to such special or other conditions as may be deemed advisable. And to convey all property sold to the purchasers. And to receive and give discharges for the purchase money. But I give full power to my said trustees to postpone the sale of any part of my real estate and to use the rents in the meantime for keeping down the interest and paying interest on the other legacies after twelve months from my death at four pounds per centum such time of postponement not to exceed three years. And I give power to my said trustees to let set repair and generally to manage my properties while they remain unsold." Then followed certain legacies. "And after the payment of all debts mortgages and charges of every kind on my estate I direct that the residue of my estate shall be divided equally amongst my two sons and my daughter their heirs executors administrators or assigns. I empower my said trustees to invest any moneys coming to their hands and which for the time being may not be required in the execution of the trusts aforesaid upon such securities real or personal as they may think fit with full power to vary and transpose the same as they may think fit. I declare that my trustees shall be responsible only for their own respective acts defaults and receipts and not for each other and shall be exempt from liability for involuntary losses or for the default of any banker broker or other agent and shall be at liberty to deduct and allow to each other all expenses incident to the execution of the trusts of this my will. And I further declare that so often as any trustee or trustees herein named or to be appointed under this power shall die or desire to be discharged or refuse or become unable or unfit to act it shall be lawful for the trustees or trustee for the time being competent to act whether desirous of being so discharged or not to appoint a fit person or persons to succeed to the office of the deceased retiring refusing incapable or unfit trustee or trustees and by force of every such appointment as aforesaid the new trustee or trustees shall have the same powers and authorities as if he or they had been originally

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appointed by this my will. I appoint the said Robert Edward Lewis solicitor to my estate and declare that in addition to the commission allowed to him as such executor and trustee as aforesaid he or any firm of which he may for the time being be a member shall be allowed the usual professional charges and shall also receive a proper remuneration for all business done and all attendances time and trouble in or about the execution of the trusts and powers of this my will whether such business is usually within the province of a solicitor or not. In witness etc."

The testator died 18th July 1897. Probate of the will was granted to the executors named in the will. On the 7th February 1899 A'Beckett, J., made an order that "the bill of costs of Robert Edward Lewis, Henry Hedderwick, and William John Fookes, solicitors (who carry on business under the firm name of Crisp, Lewis & Hedderwick), amounting to 260*l.* 9*s.* 9*d.*, delivered to William Henry Cooke and Robert Edward Lewis, the executors of the will of John Ferdinand Pfeil, deceased, be referred to the taxing officer to be taxed as between solicitor and client, and to certify the fair and proper amount to be allowed to the said executors in respect of the said bill, having regard to the terms of the testator's will." The bill was taxed, and certain objections to the taxation were disallowed by the officer, who stated his reason thus :—"This bill was taxed on the 3rd March 1899, and certain objections being received from the said solicitors, the same were wholly disallowed by me for the reason following, *i.e.* :—That all the items objected to as disallowed upon the taxation are such as are within the ordinary duty of an executor, and that Mr. Robert Edward Lewis, one of the executors appointed by the will of John Ferdinand Pfeil, is entitled thereunder to and has received a certain sum as commission for acting as trustee in the said estate, and that the said commission was intended to apply and does apply to such items as are contained in the said objections. I would refer to the following cases :—*Re Ames* (a); *In re Fish*; *Bennett v. Bennett* (b); *In re Chapple*; *Newton v. Chapman*" (c).

(a) [1881] 25 Ch. D. 72.

(b) [1893] 2 Ch. 413.

(c) [1884] 27 Ch. D. 584.

A summons to review this taxation was taken out by the solicitors.

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Higgins for the executors—It was the duty of the taxing officer to have allowed a reasonable charge in addition to the commission. “Powers” are not merely powers of investment.

Counsel referred to *In re Ames* (d); *In re Fish*; *Bennett v. Bennett* (e); *In re Chapple* (f); *Harbin v. Darby* (g).

Schutt for the residuary legatees—It is a principle of equity that no trustee should make a profit out of his trust, therefore a clause was put in wills to avoid this principle. Such clauses are not regarded favourably by the Court, and therefore in a case of doubtful construction the ordinary rule will be followed.

[HOLROYD, J. The Court rather follows the testator’s meaning.]

When it is clear. *Moore v. Frowd* (h) was the case of a trust by deed, but the same principle applies. The taxing officer’s reasons may be wrong, but his decision is right.

[HOLROYD, J. The taxing officer has evidently drawn no distinction between “executor” and “trustee.”]

What the officer says is—these two persons are both executors and trustees, and under the will commission is given them; in one part of the will they are described as trustees, in another part as executors and trustees, but the sum given is to be the remuneration for the whole of their labour.

[HOLROYD, J. If he meant that, I do not see what force he gives to these words—“shall also receive a proper remuneration,” etc. Suppose I come to the conclusion that additional remuneration was given in connection with the additional powers and trusts given by the will itself, then I should come to the conclusion also that the taxing officer has not drawn any distinction between the duties of persons appointed executors and those of trustees of the will in the execution of the powers of the will. I think in such a case the matter should be sent back to him, in order

(d) 25 Ch. D. 72.

(g) [1860] 28 Beav. 325.

(e) [1893] 2 Ch. 413.

(h) [1837] 3 My. & C. 45.

(f) 27 Ch. D. 584.

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that he may draw this distinction. He then would have to consider what were the items to be allowed in respect of solicitors' duties and what in respect of trustees'. If after doing this any items were disallowed he would give his reasons, and the reasons of a taxing officer are most important.]

The clause in the will means that in the execution of the "trusts and powers" Mr. Lewis is to be enabled to charge, but no further. There are powers of investment, and to vary investments. It cannot refer to his duties as executor, because an executor is not a "trustee" in the proper sense of the word. The cases cited refer to trustees, and do not refer either to executors or to the work done by an executor *quâ* executor.

Higgins in reply—I ask for the same order as *In re Ames* (i). Looking at this will, no such distinction as suggested between executors and trustees was drawn.

[HOLROYD, J. I cannot by calling them trusts make them trusts. What about the funeral ?]

The words "about the execution" are used. The time expended with the undertaker is time expended about the execution of that trust. All trusts involve powers, but all powers do not involve trusts.

HOLROYD, J. I think the testator intended that Lewis should be allowed, in addition to commission, not only his usual professional charges but also proper remuneration for all business done and all attendances, time, and trouble in or about the execution of the trusts and powers of his will, whether such business was usually within the province of a solicitor or not.

I think also that by the words "trusts and powers" of his will the testator intended those trusts and powers which are expressly declared by the will, whether they would be duties attaching to the executor by virtue of his office or not, but that these words do not include duties attaching to an executor by virtue of his office which the testator has not by his will declared expressly as trusts or powers. I think I ought to refer this matter back to the taxing officer to review his taxation,

having regard to the clause in the will to which I have referred and to the interpretation which I have put upon it. I direct costs to be paid out of the estate.

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Solicitors for the executors: *Crisp, Lewis & Hedderwick.*

Solicitor for the residuary legatees: *James Hall.*

R. H. C.

[PRACTICE COURT.]

KORUMBURRA WATERWORKS TRUST v. COLGATE.

Water Act 1890 (No. 1156), ss. 120, 458—Liability for water rates—Necessity for notice.—Water supply from standpipe.

1899

*May 10.*Williams, J.

Service of notice is a condition precedent to the liability of an owner or occupier to pay water rates under sec. 120 of the *Water Act 1890*, where the water supply is obtainable only from a standpipe.

ORDER TO REVIEW.

The complainant was a waterworks trust, having been duly proclaimed under the *Water Act 1890*. The defendant was sued for water rates for the years 1897 and 1898, in respect of premises situated within the jurisdiction of the trust. The complaint was heard at the court of petty sessions, and the defences, so far as material to this report, were:—

“That no pipes had been laid in the street in which defendant lives, and that the land rated is not within half a mile of any standpipe.

“That no notice as required by sec. 120 of the *Water Act 1890* had been given.”

The notice served upon the defendant in respect of the rates sued for was as follows:—

“Take notice that the commissioners of the above trust, in pursuance of the powers conferred upon it by sec. 520 of the *Water Act 1890*, have made and levied a charge of 1*l.* for the supply of water for one year, from 1st January to 31st December 1898, the same to be due and payable on the first day of January 1898. The said sum is hereby demanded.

					<i>l.</i>	<i>s.</i>	<i>d.</i>
“ Minimum on unoccupied allotments	1	0	0
“ Arrears	0	10	0
Total					£1	10	0 ”

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The evidence showed that no main pipes passed the defendant's property. That a standpipe had been erected at a distance of about 20 chains from the said property, but that the defendant did not take any water from the standpipe. Defendant's premises had not been already rated.

The court of petty sessions made an order against the defendant for the amount claimed, with 4*l.* 4*s.* costs.

The only material ground of several on which the order to review was obtained was—"That there was no evidence to show that the defendant was liable to pay rates or be rated."

Cussen to show cause.

Wilkie to move the order absolute cited *Cameron v. Moore (a)*; *Western Wimmera, etc., Water Supply Trust v. Wynne (b)*.

WILLIAMS, J. I think that the second ground of this order to review is good, and I express no opinion on the other grounds. I think the point as to sending notice is important. I think that sec. 458 of the *Water Act* 1890, which provides that owners or occupiers are to be rated after publication only of a notice does not apply in this case. The service of the notice, as I have said, is the important matter. I am glad to be able to decide on this second ground, as it makes the matter simpler and easier. In support of the magistrate's decision against the defendant it was urged that the defendant, although not supplied with water and not having been already rated, but being within a quarter of a mile of a standpipe erected by the trust, was liable to pay rates under sec. 120 of the *Water Act* 1890. Mr. Wilkie for the defendant answered that by saying that the defendant had not been served with the notice required to be given under that section. The justices appear to have held that in spite of that the defendant was liable. They apparently held that the service of the notice was not a condition precedent, and seem to have relied on sec. 458, which relates to a different class of persons and not to people in the position of the defendant here,

(a) [1894] 15 A.L.T. 232.

(b) [1898] 23 V.L.R. 560.

who had no water-pipe in front of his premises, but had to depend for his supply of water on a standpipe erected a quarter of a mile away. As a matter of fact, the defendant did not use the standpipe, but that does not matter. Sec. 120 provides that people in the position of the defendant shall be served with notice. That notice will be to the effect, I suppose, that the standpipe has been erected, and that any people being within half a mile of it are to be rated. The section enacts—"And after one month from the date of such notice the owners or occupiers of all such tenements shall be liable to pay rates for the supply of water from such standpipe." I should say, therefore, that until he is served with this notice the owner or occupier is not liable. I think that is perfectly clear; he is to be liable only after one month from the date of the notice. In this case the defendant never had any notice, and I do not think sec. 458 applies to him, and therefore he is not liable.

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Order absolute, with costs.

Solicitors for complainant: *Maddock, Johnson & Jamieson.*

Solicitor for defendant: *Mellor.*

A. F. M.

[PRACTICE COURT.]

**McELROY v. AUSTRALIAN FORGE AND ENGINEERING COMPANY
PROPRIETARY LIMITED.**

1899
May 31.
Williams, J.

*Employers and Employes Act 1891 (No. 1219), ss. 3, 5—Meaning of employé—
Workman working as independent contractor—Jurisdiction of justices.*

A. agreed with B. to do certain work for B.—to paint some trucks according to specification. B. accepted this offer.

Held, that this was a contract whereby A. was not bound to do any of the work personally but might get it done by deputy; that therefore he was not an employé within the meaning of sec. 3 of the Act No. 1219, and consequently the justices had no jurisdiction under sec. 5 of the Act to adjudicate upon a dispute between A. and B. touching the contract.

THIS was an order to review a decision of the Court of Petty Sessions at Williamstown.

It appeared that the complainant on the 7th of December 1898 made the following written offer to the defendant company:—

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"I, D. McElroy, do hereby agree to paint the remaining 200 trucks with machine and hand according to specification for the sum of 15s. 6d. per truck. Labour only and supply brushes, also hand-paint when necessary. All work to be done to the complete satisfaction of the inspector."

The next day this offer was accepted by the defendant company in writing as follows:—

"We accept your offer to paint 200 railway trucks with machine and hand as required to complete satisfaction of the inspector of railways at the rate of 15s. 6d. sterling each. The work is given you on condition that you push the work through as quickly as possible. Your price will include all labour and tools required for your work, and we will supply the necessary material."

On finishing the work the complainant sued the defendant for 19l. 11s. 1d. for work and labour done and material provided, and the defendant company in its notice of set-off, after claiming for some other items supplied to complainant, claimed the following by way of set-off:—

"By damage to truck door by complainant's neglect, 10s. By damages through having to finish complainant's work on 66 trucks, and extra expenses caused through his default, 2s. per truck—6l. 12s.

It also appeared that in giving receipts for sums due to him on the contract complainant sometimes signed as for "wages," and sometimes did so on printed forms of the defendant.

The order to review was obtained on the ground—"That the justices were wrong in adjudicating upon the items following [here followed the items of set-off as set out immediately above] and allowing the same, inasmuch as the justices had no jurisdiction to adjudicate upon and allow the said items."

Wolfe Fink to show cause—I submit the magistrates had a perfect right to find that this man was an *employé* under Act No. 1219, and they would properly do so. He undertakes in his own name personally to do the work.

Counsel cited *Grainger v. Aynsley* (a); *Brown v. Butterley Coal Company* (b).

Power to move the order absolute—The complainant was an independent contractor, and it was a contract regarding him as such that was accepted by the defendant.

(a) [1880] 6 Q.B.D. 182, *Lopes, J.*, at p. 189. (b) [1886] 53 L.T. 964.

[WILLIAMS, J. Your argument is that he could get the work, if he chose, done by other people; that he was not an *employé* at all, and need not himself do a stroke of the work.]

Precisely.

Counsel cited *Lancaster v. Greaves* (c); *Ingram v. Barnes* (d); *Riley v. Warden* (e); *Ex parte Rathbone* (f); *Lobb v. Amos* (g).

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WILLIAMS, J. This is an application by the complainant to review a decision of justices. The singularity of this case is that the complainant, who succeeded before the justices and obtained an order in his favour for 9*l.* 3*s.* 1*d.*, is not satisfied with that, but says that he desires to have the sum of 7*l.* 2*s.* additional, because he contends that the justices allowed against him two items by way of set-off concerning which, he says, they had no jurisdiction. These items are, "by damage to truck door by complainant's neglect, 10*s.*," and "by damages through having to finish complainant's work on 66 trucks, and extra expenses caused through his default, 2*s.* per truck—6*l.* 12*s.*" The justices, it is conceded, would only have jurisdiction on those two items if the complainant were an *employé* within the meaning of the *Employer and Employés Act* 1891 (No. 1219). The whole question therefore resolves itself into this, Was this complainant an *employé* within the meaning of that Act? It is said that this is a question of fact for the justices to decide, and if there were evidence both ways, and if this were not a question which depended upon the construction of written documents, that would be so without doubt. But I think it is very plain, from the documents in evidence, that this complainant was not an *employé* within the meaning of the Act. Both documents—the offer to do the work and the acceptance of that offer—are before me, and both are in writing. The offer was to paint a large number (200) railway trucks to the satisfaction of the inspector of railways, at a certain rate, and that was accepted by the document of 8th December. (His Honor read the acceptance as already set out.) Now,

(c) [1829] 7 B. & C. 628.

(d) [1857] 7 Ell. & Bl. 115.

(e) [1848] 2 Exch. 59.

(f) [1892] 13 N.S.W. L.R. 56.

(g) [1886] 7 N.S.W. L.R. 92.

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reading these two documents together, it appears to me plainly manifest that they amount to this :—The complainant says—“ I offer to paint or to get painted 200 railway trucks, and I engage that they shall be done to the complete satisfaction of the inspector ;” and the defendants say—“ We will accept that offer ; the price is to include all labour and tools, and we are to supply the materials.” I think that, under that contract, the plaintiff himself need not have put a single finger’s turn to the work in question. He could employ other men to do the work for him, and if the work were well done and to the satisfaction of the inspector, who passed it, the complainant would be entitled to get the money mentioned in the contract paid. He could in fact get the work done by deputy, and was not bound under the contract to work personally. If that be so, then I think it ends the matter, and that the complainant is not an *employé* within the meaning of the 3rd section of this Act No. 1219. The contracts contemplated by that section are either contracts of service or contracts under which a man undertakes the personal execution of some work. As the construction of this contract is a matter of law, I am not infringing upon the jurisdiction of the justices to decide upon facts. But apart from that it does upon the facts appear that the complainant did employ a large number of men in the execution of the work, and further, that the defendant company in many—in very many—instances paid these men their wages, and to corroborate that the defendant has debited the complainant in the particulars of the set-off with the amount of wages it paid for doing the work. The only other fact on which the defendant relies is that there are receipts for small sums paid by the defendant to the complainant in which the complainant gives a receipt as for “ wages.” These receipts are on the printed forms of the defendant company, but that does not influence me, because there are also receipts where the payments are not set out as “ wages.” I prefer to proceed generally on the proper construction of the contract before me. As it was a contract under which the complainant was not bound to do a single thing himself in the work, I think that he was therefore not an *employé* within the meaning of the Act, and that the justices had there-

fore no jurisdiction to adjudicate upon the items of the set-off. The order of the justices will be varied by increasing the amount of the order in favour of the plaintiff by the sum of 7*l.* 2*s.*, and the order *nisi* will be made absolute, with costs.

Solicitor for complainant: *Nolan*.

Solicitors for defendants: *Fink, Best & Hall*.

A. F. M.

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IN THE MATTER OF THE CORONERS ACT 1890.

IN RE O'CALLAGHAN.

The Coroners Act 1890 (No. 1077), s. 4—Coroner, jurisdiction of to commit for contempt—Coroner's Court—Witness, refusal of to answer—Question tending to criminate—Warrant of commitment, form of.

A coroner has power to commit a witness for contempt in refusing to answer a question pertinent to the inquiry. The powers of a coroner are not limited by the provisions of sec. 4 of Act No. 1077.

A warrant of commitment following the form set out in the Second Schedule to Act No. 1077 is sufficient although it does not state that the inquisition was held in the presence of jurors.

F. C.
1899
June 22, 23.

CERTIORARI.

At an inquest held on 9th May 1899 by Samuel C. Candler, one of Her Majesty's coroners for Victoria, on the body of an infant, Joseph O'Callaghan, a witness, Catherine Dillon, after being duly sworn, refused to answer the following question put to her by the coroner—"What is his name?" (meaning the name of a person who signed a certain agreement previously deposed to at the inquest, and between such person and the witness, Catherine Dillon). And upon being asked by the coroner in open court whether she had any reason to urge by herself or her counsel, who was then present in Court, why she should not be committed to gaol for her contempt in refusing to answer the question, failed to urge anything which in the coroner's opinion was of any validity against it. The coroner being of opinion that the question was proper to the inquiry gave his decision in open Court to that effect, and thereupon he issued his warrant committing Catherine Dillon to gaol.

F.C.

1899

In re
O'CALLAGHAN.

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO GIVE EVIDENCE.

In the Matter of the *Coroners Act 1890*

And

In the Matter of the *Infant Life Protection Act 1890*

And

In the Matter of an Inquest touching the death of
one Joseph O'Callaghan an infant deceased.

Victoria to wit.

Whereas I heretofore issued my summons under my hand directed to Catherine Dillon requiring her personal appearance before me Coroner for the said colony of Victoria at the time and place therein mentioned to give evidence and be examined on Her Majesty's behalf at an inquest touching the death of the said Joseph O'Callaghan the said infant then and there lying dead. And whereas the said Catherine Dillon having appeared pursuant to the contents of the said summons and having been duly sworn to give such evidence and to be so examined. And whereas at a lawful adjournment of the said inquest namely upon Tuesday the second day of May in the year of our Lord One thousand eight hundred and ninety-nine the said Catherine Dillon being under examination upon the said date was asked by me through counsel duly instructed by the Crown Solicitor to assist me at the said inquest the following question that is to say:—"What is his name?" (meaning the name of a person who signed a certain agreement previously deposed to at the said inquest between the person last mentioned and the said Catherine Dillon). And whereas the said Catherine Dillon hath wilfully and absolutely refused to answer the said question and be examined touching the premises and to give sufficient reason for her refusal in wilful and open violation and delay of justice. And whereas the said Catherine Dillon was at a further lawful adjournment of the said inquest namely upon Tuesday the ninth day of May in the year of our Lord One thousand eight hundred and ninety-nine warned by me that in the event of her still refusing to answer the said question she would be committed to gaol for her contempt in refusing to so answer. And whereas the said Catherine Dillon notwithstanding the said warning persisted in such refusal. And whereas the said Catherine Dillon was thereupon asked by me in open Court whether she had any reason to urge by herself or her counsel then present in Court why she should not be so committed. And whereas nothing that in my opinion was of any validity in law was so urged on her behalf. And whereas in my opinion the said question is as I now decide in open Court a proper inquiry into circumstances which may throw light upon the treatment and condition of the said infant during his life and into other matters into which in my opinion it is desirable in the interests of public justice that I should inquire within the meaning of the *Infant Life Protection Act 1890*.

These are therefore by virtue of my office in Her Majesty's name to charge and command you or one of you the said constables and others Her Majesty's officers of the peace in and for the said colony of Victoria forthwith to convey the body of the said Catherine Dillon to the Melbourne Gaol in the said colony and safely to deliver the same to the Governor of the said gaol and then and likewise by virtue of my said office as Her Majesty's Coroner to will and require you the said Governor to receive the body of the said Catherine Dillon into your custody and her safely to keep in the said gaol until she shall consent to give her evidence and be examined before me and my inquest on Her Majesty's behalf

upon the premises or until she shall be discharged from thence by due course of law. And for your so doing this is your Warrant.

Given under my hand and seal this ninth day of May A.D. 1899.

C. CANDLER,
Coroner. (L.S.)

To all Constables and other Her Majesty's Officers of the Peace in and for the Colony of Victoria and also to William Robert Davidson my special officer.

On the 22nd May Williams, J., granted a rule *nisi* calling upon the coroner to show cause why a writ of *certiorari* should not issue for the purpose of bringing up and quashing the warrant on these grounds:—

1. That the warrant is bad on its face for that—(a) it is not alleged or shown that the inquest was duly taken, as it was not alleged that it was taken in the presence of jurors; (b) it is not shown that the commitment was for wilful misbehaviour or for wilful interruption or for wilful prevarication; (c) the imprisonment was for an indefinite period.

2. That the warrant is bad inasmuch as—(a) it is not shown that the refusal to answer was wilful or wrongful; (b) it is not shown that the commitment was for wilful misbehaviour or for wilful prevarication.

3. The witness did allege sufficient reason, namely that she upon oath swore that her answer would incriminate her or tend to incriminate her.

4. That it was not shown that the coroner was not of opinion that Catherine Dillon's answer would tend to subject her to punishment.

5. That the answer to the question put was irrelevant to the inquiry.

6. That the said coroner had no jurisdiction to commit on the facts shown.

7. That the coroner exceeded his jurisdiction on the facts shown, inasmuch as there was power (if any) only to fine.

The rule was returnable on 22nd May 1899.

The matter was in the first instance argued before A'Beckett, J., and was referred to the Full Court.

The further facts may be sufficiently gathered from the judgment.

Bryant to move the rule absolute.

F.C.

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It was intimated by the Court that the question of jurisdiction was the only one upon which A'Beckett, J., felt difficulty.

Isaac A. Isaacs (A.G.) and *W. Lewers* to show cause—In the course of the inquest it appeared from the evidence that the child was illegitimate, and that Catherine Dillon was the person with whom its mother had gone to stay some fourteen days after the child's birth. The mother had taken care of the child, which was in good health up to the time when she left to go to her people. At that time no arrangements had been made for adoption or taking care of the child permanently. During the mother's absence the child's father entered into some agreement in writing with Catherine Dillon, whereby he paid her the sum of £90. The terms of the agreement were not stated, nor was it produced. Catherine Dillon wrote to the mother saying that the child was well. After this the child became ill. Catherine Dillon then registered herself under the provisions of the *Infant Life Protection Act* (No. 1198). The mother wrote and was told the child was dead. It had congenital syphilis. The medical evidence was not closed. The coroner thought it his duty to ask Catherine Dillon the name of the person who made the agreement. She refused to tell. Rigby, the solicitor, claims privilege. Apparently the agreement is in the possession of the child's father. The question now is whether the coroner has jurisdiction to insist that Catherine Dillon should state the name of the person, or whether he has no power to commit a witness who declines to give evidence. The *Coroners Act* 1890 is a repetition of the *Coroners Statute* 1865, and does not introduce any new law except the concluding portion of sec. 4. Among the powers of coroners at common law is the power of committal. 11 & 12 Vict., c. 43, sec. 7 was put in force in Victoria by 14 Vict., No. 43 (New South Wales), and made specific provision for the case of a witness refusing to answer. Refusal to answer is not wilful misbehaviour or wilful prevarication. The witness may in a quiet manner decline to answer. 14 Vict., No. 43, was repealed by the *Justices of the Peace Act* 1865 after the passing of the *Coroners Statute* 1865. Up to the time of the passing of the latter Act justices of the peace had two

distinct powers of commitment. The *Justices Act* 1890, secs. 39, 42, 76, 77 define justices' powers. In the case of a witness's refusal to answer they may adjourn for seven days, in the meantime committing the witness. The one class of contempt refers to something done, the offence being complete where the justice knows the extent of his jurisdiction and may regulate the punishment. In the other class, where the witness refuses to answer, the offence is continuous, and therefore the punishment does not admit of being fixed in the same way. At common law the coroner had all the powers in this respect of a court of record. The *Statute of Marlbridge* (52 Hen. III., c. 4) took away from him the power to impose fines. The question here is not what power is given him but what power is taken from him.

Counsel referred to 8 & 9 Vict., c. 92; *The Queen v. Lefroy (a)*; *Coroners Amendment Act* 1869; *Infant Life Protection Act* (No. 1198), sec. 12.

(Counsel were stopped.)

Bryant—If the coroner can commit for contempt in the face of the Court, he is, under the *Justices Act* 1890, secs. 28 and 29, to have unlimited power, but where the refusal to give evidence is additional to the insult to the Court he may only give a restricted punishment. A continuous refusal to answer, although most respectful, is nevertheless wilful, and the refusal itself is misbehaviour within the meaning of sec. 4 of the *Coroners Act*. The Court cannot assume from the decision in *Casey v. Candler (b)* that the Coroner's Court has all the powers of a court of record. It is an inferior court, and its powers of commitment are limited: *The Queen v. Lefroy (c)*.

[MADDEN, C.J. That case is distinguishable. The Coroner's Court itself had all these powers at common law, but the County Court had no powers at common law. The last paragraph in the judgment appears to point to this distinction.]

The *Coroners Statute* 1865 recognized the existence of the coroner and of his court as an inferior court of record, but its

(a) [1873] L.R. 8 Q.B. 134.

(b) [1874] 5 A.J.R. 179.

(c) L.R. 8 Q.B. 134.

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language is intended to limit specifically the coroner's powers of committal to those exercised by justices.

[*Isaacs* (A.G.)—*The Queen v. Lefroy* was considered in *The Queen v. Judge of the Brompton County Court* (d).]

There must be a variance between the powers given by statute and those given by common law. *Justices Act* 1890, sec. 29 (8), authorizes justices to hold coronial inquiries.

Counsel referred to *Justices Act* 1890, secs. 42, 77 (12); *Sewell's Law of Coroners*, p. 163; *Impey's Office of Coroner* (1st ed.), 108, 109, Forms 110–117; *Infant Life Protection Act* 1890, sec. 12.

The coroner's jurisdiction in an inquiry is not unrestricted. There must be some kind of control.

[MADDEN, C.J. A question of relevance which might not be inquired into by this Court need not trouble the coroner, because his is merely a court of inquiry. It lies upon you to show affirmatively that his action was extravagant.]

A'BECKETT, J. I do not see how this inquiry would have benefited by disclosure of the name, but I should have thought the coroner the sole judge as to whether such a question was necessary or not. It would be in the highest degree dangerous and undesirable that a witness should challenge the propriety of a question put to him by the coroner. It was merely upon this question of jurisdiction that I had difficulty.]

There was no power to commit, because Mrs. Dillon had before her the fear of incrimination.

Counsel referred to *Attorney-General v. Jules Renard & Co.* (e); *R. v. Garbett* (f); *Lamb v. Munster* (g); *Smith v. Powell* (h); *Roscoe's Criminal Evidence* (9th ed.), p. 151.

The warrant is bad on its face, because it does not show all the facts necessary to jurisdiction. The Court will not presume anything in favour of the jurisdiction of an inferior court: *Day v. King* (i); *Doyle v. Falconer* (k). The warrant does not show that the inquest was held in the presence of jurors.

[MADDEN, C.J. It might be that the contempt was com-

(d) [1893] 2 Q.B. 195.

(e) [1899] 24 V.L.R. 970.

(f) [1847] 2 Car. & K. 474.

(g) [1882] 10 Q.B.D. 110.

(h) [1884] 10 V.L.R. (L.) 79, at p. 84.

(i) [1836] 5 A. & E. 359.

(k) [1866] L.R. 1 P.C. 328, at p. 342.

mitted before the jurors were present. The inquisition began with the coroner's view of the body.

A'BECKETT, J. I do not see why it should be necessary to go beyond the form in the Act, and to state that jurors were present. If so, every detail would have to be stated. Surely it is enough to say that the coroner is holding an inquest.]

Counsel referred to *The King v. The Justices of Kent* (l); *Dwarris on Statutes*, vol ii., 668.

Isaacs in reply.

R. H. C.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., A'BECKETT and HODGES, JJ.] This is a rule *nisi* for *certiorari* to quash a warrant issued by Mr. Candler, a coroner, and all proceedings in connection therewith, the broad ground of objection being that the coroner had no jurisdiction to commit to prison, and that if he had jurisdiction he exercised his authority with certain irregularities, which nullified his commitment. The coroner's court is a court of record, and, as was laid down in *Dicas v. Lord Brougham* (m), and also affirmed in this Court in the case of *Casey v. Candler*, a court of record, whatever it may be doing, has power to commit for contempt. It is said here that, although so much may be yielded as to this particular court of record as originally constituted, the coroner's court in this colony has now by statutory enactment but a limited power to commit—namely, for special faults or improprieties, and in default of payment of fine only, because the statute itself imposes a fine, and in default of payment of that fine imprisonment may be ordered. Of course, one recognizes the fact that, although there are courts of record at common law, yet, under our constitution there may be a court of record created by statute, and in such a case the court can take nothing except that which the creator of that court has given; for its powers are the powers which the Legislature has chosen to give it: it has nothing inherent, nothing but what is attributable to the particular legislation.

(l) [1809] 11 East. 229.

(m) [1833] 6 C. & P. 249.

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The coroner's court springs from the common law. At one time it was part of the highest of the courts of record, and many years ago, although ceasing to be part of the Great Council of the King, it still continued to be a court of record of the highest importance. Up to the Magna Charta it had at common law the duty of inquiring into the cause of death of persons dying suddenly, and had also the duty of determining certain pleas of the Crown. It continued after the Magna Charta as far as holding inquisitions was concerned a court of record as high as it ever was. At later periods statutes have modified its original jurisdiction, and, amongst other things, the court had formerly the unlimited rights of a court of record to enforce the conduct of its own proceedings with propriety and safety. An English statute reduced its authority to punish by a fine to the amount of 2*l.* in England. Originally in this colony coroners were appointed, it is said, by no special authority, but they were appointed by the governing authorities here by name of coroners, and they sat as coroners, and in Acts of Parliament they were recognized by that name. In *Casey v. Candler* the Court recognized the fact that apart from the force of the term the very nomination of a person to sit as coroner carried with it all the rights of the coroner's court. It may therefore be taken the coroner sits here, as he sits in England, as a court of record as the coroner's court. Then, originally, or not long after the appointment of coroners in Victoria, they were also made justices of the peace by statute. I do not know the reason why—it may be because ordinary justices were not so easily available as now, or because it was desirable to have some person regularly giving his attention to the office of justice of the peace. However that may be, the fact remains that there was superadded to the office of coroner the office of justice of the peace, and there was introduced into the statute relating to coroners a provision that they were to be justices, and also that provision in sec. 4, so much relied upon, that they should have "the same power of punishing for wilful misbehaviour or wilful interruption of the proceedings of the court or wilful prevarication in giving evidence therein as any justice has by any law now or hereafter in force

in the case of like offences committed in any court of petty sessions." Now, so far as they were coroners, that would be a very small power indeed in comparison with the powers they had at common law as coroners. That provision came into the legislation of this colony at the same time as their appointment as justices, and it is probable that the one power was put in as necessary to the other. As justices they could not exercise the powers which as coroners they possessed, and it was deemed necessary to give them some means when sitting as justices to conduct the business of their courts properly. It is now said, however, that sec. 4 has the general effect of reducing the coroner's power to commit to the narrow limits mentioned in the concluding clause of that section. That would be a tremendous cutting down of the authority of the coroner. We think it has no such effect. Whether we regard the meaning of the words as we read them, bearing in mind the subject matter dealt with, or whether we interpret the words themselves and look at the history of the legislation, or are guided by the effect those words would have upon the efficiency of the coroner's office, we come to the conclusion that those words do not deprive the coroner of his common law right to commit for contempt. He is, by sec. 4, to have "in respect of all inquiries . . . all the powers authority and jurisdiction which now belong by law to the office of a coroner in England;" the word "inquiries" is very large, and the words of the section may well include the refusal to do that which a well-behaved witness ought to do. The coroner is a court charged to inquire, and his inquiry is much more at large than the inquiry of any other court. He is not bound down to any particular issue at all; he is charged to find out a suspected offence in order that another court may afterwards deal with that offence according to the process of law. The refusal of a witness to answer a question might, without this full measure of punishment, result in defeating the very purpose of the coroner's office. If such refusal could only be met by the mere imposition of a small penalty such as a justice in petty sessions may impose, the inquiry by coroner in his court would be futile. Notwithstanding the generality of these words, we can see a

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natural, consistent and effective interpretation of the intention of the Legislature in giving them the meaning we have indicated. The words in the last clause of sec. 4 may refer to persons making a noise in court, disturbing the business of or threatening the court, or where a witness is insolent or seeks to evade telling the truth; some of those things may have really nothing to do with the inquiry at all. In that class of case the coroner may exercise his power to the limit that a justice may his. But where the witness refuses to answer a question relevant to the issue, then, in order to enforce an answer, he must have the right to hold the witness to an answer, and to punish him until he does answer. We therefore think that the effect of these words is not to cut down the common law rights in relation to the actual inquiry, but to give the coroner a new remedy for preventing interruptions from persons who may have no concern in the inquiry at all. We therefore think that the coroner has certainly jurisdiction in appropriate cases to commit for contempt those persons who refuse to give him the information which by law he is authorized to exact from them.

It was next urged that the warrant is bad on its face. (His Honor read the objection.) That assumes that the only power of commitment which the coroner has is that power referred to in sec. 4. We do not think that that is so; besides that power, and superior thereto, he has another power to commit to the extent already mentioned. Then it is said that if the coroner has authority to commit for contempt in not answering a question in the course of the inquiry, he can only so commit when the witness refuses to answer a question relevant to the inquest, and if a question is asked beside the matter in hand, and which is not relevant, the coroner cannot commit. It is said here that the question was irrelevant in fact. The coroner holding this particular inquest had not only the common law duty to inquire into the suspicious death of this infant, but he had an obligation imposed upon him by sec. 12 of the *Infants Life Protection Act*. That section makes it his duty to inquire not only into the cause of the death, but into all other matters necessary for effectually carrying out the purposes of the Act. We think that the coroner in dis-

charging these multiform duties certainly has an extremely wide scope open to him, and he must himself be the judge as to what is or is not relevant to his inquiry. It is not suggested that the coroner had any motive other than to do his duty. It might well be, if the question was asked from mere malice, that other questions would arise, but it is admitted that the coroner did what he did believing that he was pursuing the obligation imposed on him by statute and in accordance with his duty. If that be so the Court should not exercise any control over his powers. He knows better than any others what the line of the inquiry really is; matters may come to his knowledge as to the course he should pursue, and we should not restrain him from carrying on the inquiry. It would be a mischievous thing to do, and we should not interfere unless it is suggested that he is impelled by malice or by some unbecoming curiosity. He, therefore, is the judge of the pertinency of the question.

Then it was urged that Mrs. Dillon took the objection that she was privileged from answering and demanded to be excused. Now, it is a first principle of our law that nobody shall be called upon to contribute to his or her own conviction. The law gives everybody a right to object to answer a question in any court of law which would tend to have the effect of rendering him or her criminally liable for some offence. When circumstances present themselves in such a connection the Court should always be anxious to see that the person who alleges that right is not deprived thereof, and also to be cautious and anxious that the pretence of such a right shall not be used as an instrument to befool the Court and defeat the aims of justice. Stating these principles it follows almost necessarily that the Court sitting at the time when the objection is made and the Court to whom such objection is made must always be the sole judge whether or not the objection should be allowed. The Court has to be satisfied that the objection is *bona fide*, and is not used to defeat the purposes of the Court. The coroner therefore has to judge of the *bona fides* of the person who takes the objection, and no other court can judge so well as the court that sees the witness, marks his demeanour, knows the crisis of the case in which the point arises,

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and appreciates the force and extent of the probable answer. Therefore this Court—though I do not say it could not in plain cases—would be extremely cautious before it interfered with the right of the court to which the objection is made to judge of its *bona fides*. In this particular case the coroner was certainly at liberty to form his opinion that this was not a *bond fide* objection on the part of this witness. When she was first asked, her objection was that she did not desire to hurt a respectable family ; then she made another explanation, and after the adjournment she stated that her objection was based upon the statute which would render her liable to prosecution for not having registered her place of business. The question itself certainly involves a very remote possibility of her being prosecuted. It may be that it involves none whatever. It is admitted that the child was illegitimate, and therefore the person who paid the sum of 90*l.* was not the parent or guardian of the child ; the child had but one parent in the eye of the law, and that was the mother. The person who paid the sum of 90*l.* was not the parent within the meaning of the statute. It would be the duty of the coroner to give effect to the objection where there was not only a reasonable ground for apprehending prosecution, but even a reasonable possibility of prosecution. Where the witness does not *bond fide* raise the objection, or where there is but a manifestly remote danger to him or her, the coroner might decide that the objection was not *bond fide*, and insist upon an answer to the question.

We have thus far dealt generally with the broad objections raised. Dealing with the grounds *seriatim*—“(1) that the warrant was bad on its face for that—(a) it is not alleged or shown that the inquest was duly taken, as it was not alleged that it was taken in the presence of jurors.” In this instance the warrant follows the form prescribed by the statute. It is provided by the statute that it shall be in the form contained in the Second Schedule. We think that those forms, as is usual, are merely intended to be examples of the kind of form required. We think that the warrant which is said by the statute to be sufficient in form as for a case of murder

may be quite sufficient for the committal of a witness refusing to answer a question, and we think this form of warrant is sufficient. That form in the statute is open to the same criticism; it does not say that the inquisition was being pursued in the presence of jurors. Everything, however, is shown on this warrant, which makes it manifest that the coroner was sitting as a coroner in open court upon the body of the infant then and there present, and that he was taking the inquest in the ordinary way, and that the question was put to her in the course of that inquest. As it was plain that he was in truth pursuing the inquest it is fair to believe that he was pursuing it in the only way it could be taken—namely, before jurors. It is unnecessary, therefore, to say that this was bad because it does not set forth that fact. It has been pointed out, too, that the only effect of allowing this objection would be that the coroner would at once put in a proper warrant. It would be a trivial thing to hold that this warrant was bad, and so impose upon us the obligation to quash an order for a defect which could be at once remedied. The second objection (*b*) of No. 1 we have already dealt with. As to objection (*c*) of No. 1 it follows from our previous finding that the coroner had the jurisdiction of a court of record, so as to enforce the very purpose of his sitting. The object is to make the woman answer, and it would be futile to limit the term of her imprisonment. She is to be committed until her contempt is purged—that would be until she consents to answer the question. If the coroner has the power to demand an answer he must have authority to commit for an indefinite period.

As to the second and third grounds, I have already dealt with those. As to the fourth ground—that the coroner had not set out the ground upon which his opinion as to the effect of the question was based—that assumes that if the coroner had the right to disregard the objection to answer on the ground that it would tend to incriminate her, he is bound to set out his finding on that point. We find no authority that a judge should set it out in the proceedings at all. He does all that he has to do when he decides the point. All that he may lawfully find he has found. We must assume that he has acted rightly. As a common

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practice, when such objection is overruled by a judge he merely says that such a question should be answered. As to the fifth ground, I have dealt with that. That was for the coroner to decide, and there is nothing to show in this matter that his conduct or course of proceeding was in any way an impertinent departure from his duty. As to the sixth ground, we have decided that he had jurisdiction ; and we have decided, as to the seventh ground, that he has not exceeded his jurisdiction. The rule *nisi* will be discharged.

The Attorney-General—We do not ask for costs.

Rule nisi discharged, without costs.

Solicitor for applicant : *A. E. Jones.*

Solicitor for respondent : *Guinness, Crown Solicitor,*

W. H. M.

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ATTORNEY-GENERAL v. JULES RENARD AND COMPANY.

[1898, No. 368.]

Customs Acts—1890 (No. 1161), s. 84 ; No. 1471, s. 9—*Powers of Commissioner of Customs—Invoice—Goods—Forfeiture—Undervaluation.*

Where it appears to the Commissioner of Customs that foreign goods entered at the Customs for *ad valorem* duty are in an invoice or entry produced by the importers undervalued, all such goods are, under sec. 84 of the *Customs Act 1890*, forfeited, or liable to be forfeited, to Her Majesty.

POINTS of law reserved.

By order of Hood, J., dated 30th March 1899, and by consent of parties, the points of law raised by the pleadings in the action were set down for argument before the Full Court.

AMENDED STATEMENT OF CLAIM.

The plaintiff says that—

1. The defendants are a firm of merchants and importers carrying on business in Little Collins-street, Melbourne, in co-partnership, under the style or name of Jules Renard and Company.

2. On the 29th October 1897 the defendants imported into Victoria, in the ship *Hebe*, and thereafter caused to be unshipped

and landed in the port of Melbourne, for home use in Victoria, 28 packages, or cases containing chairs, the said packages or cases and their contents then being liable and subject to duties of custom.

3. The said packages or cases and their contents were exported by the manufacturers of the chairs from Vienna, in Austria.

4. The defendants on the 29th October aforesaid, in pursuance of the *Customs Act* 1890, entered the said packages or cases and their contents for *ad valorem* duty by customs entry No. 7056 of the 29th October 1897, and the said entry stated the value of the goods therein referred to as 115*l.* 7*s.* 4*d.*

5. At the time of making such entry, and for the purpose of verifying (in pursuance of the *Customs Act* 1890) the true and real value of the goods referred to in the said entry, the defendants produced an invoice as and for the genuine and only invoice for all the said goods, and the defendants, by their duly authorized agent, servant, or shipping clerk, in further pursuance of the said Act, made, signed, and subscribed a declaration duly signed by the said agent, servant, or clerk, and indorsed or printed on the back of the said entry, the material parts of which declaration are as follows :—

I, Walter F. Robinson, do hereby declare that I am the agent duly authorized by Jules Renard and Co., the importers of the goods mentioned in this entry, and that the invoice now produced is the genuine and only invoice received by me or by any other person to my knowledge, or which I expect to receive, of all the goods mentioned in this entry, and contained in the packages marked, numbered, and described therein; and that the value of such goods mentioned in this entry and the aforesaid invoice, and therein stated as *ad val.*, 115*l.* 17*s.* 4*d.*

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to the best of my belief, the fair and real market value at which such goods were ordinarily sold at the time of shipment in the principal market or markets of the country whence the same were exported, and without any deduction because of the exportation thereof on account of my being the agent, representative, or partner of the manufacturer, seller, consignor, or exporter thereof, or for

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any other special consideration whatever other than such as would be allowed in the ordinary course of trade to any exporter thereof; and that the price paid or to be paid for the goods and stated in the said invoice is the usual and ordinary price paid for such goods in the country whence they were exported. And I further declare that . . . nothing on my part, nor to my knowledge on the part of any other person, has been done, concealed, or suppressed whereby Her Majesty the Queen may be defrauded of any part of the duty lawfully due on the said goods.

6. It thereupon appeared to the Commissioner of Trade and Customs, acting in the exercise of his office and under and by virtue of the *Customs Acts* in respect of the said invoice and entry, that in the said invoice and in the said entry the said goods entered for *ad valorem* duty as aforesaid had been and were undervalued with intent of avoiding the payment of part of the duty on such goods.

7. By reason of the premises, the plaintiff contends that all the said packages or cases and all the said goods were, under the provisions of sec. 84 of the *Customs Act* 1890, forfeited, or alternatively liable to be forfeited.

* * * * *

10. By reason of all the matters hereinbefore set forth in this statement of claim, on or about 17th December 1897, certain 23 of the said 28 packages or cases of goods were seized on behalf of Her Majesty by the proper officer of customs in that behalf, as forfeited under the said sec. 84 of the *Customs Act* 1890, as the property of Her Majesty, due notice whereof has been given to the defendants.

The plaintiff claims a declaration that the said packages or cases and the said goods were duly forfeited or liable to forfeiture under the provisions of sec. 84 of the *Customs Act* 1890, and also that the same are now the property of Her Majesty.

AMENDED DEFENCE.

The defendants say that—

1. Subject to the production of the entry, invoice, and

declaration mentioned in paragraphs 4 and 5 of the statement of claim, they admit the first five paragraphs thereof.

2. They do not admit paragraph 6 of the statement of claim, and submit the contention of law raised by paragraph 7 to the judgment of the Court.

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6. They will contend that the first six paragraphs of the statement of claim disclose no cause of action, for that it is not alleged therein that the said goods were in fact undervalued in the said entry and invoice, nor is it alleged that there were any facts or evidence before the said Commissioner from which it could reasonably appear to him that the said goods were so undervalued aforesaid with intent of avoiding the payment of part of the duty upon such goods. And the defendants will contend that upon the true construction of the said sec. 84 goods cannot be and are not liable to be forfeited merely because they appeared to the said Commissioner to be undervalued with such intent as aforesaid.

Isaac A. Isaacs (A.G.) and W. Paul for the plaintiff.

Mitchell and Coldham for the defendants.

During argument reference was made to *Dowling v. Billings* (a); *Hopkins v. Smethwick Local Board* (b); *Attorney-General for Jersey v. Turner* (c); *Customs Act 1890* (No. 1161), secs. 5, 84, 241, 265; *Act No. 1471*, sec. 9.

A'BECKETT, J., delivered the judgment of the Court [A'BECKETT, HODGES, and HOOD, JJ.] This is an action brought to obtain a declaration of forfeiture of certain goods which are alleged to have been forfeited under sec. 84 of the *Customs Act 1890*. The defence to the allegations of the statement of claim by paragraph 6 raises these legal questions (His Honor read them and continued):—In reference to that defence, an order was made that the points of law raised by these paragraphs should be

(a) [1893] 19 V.L.R. 51.

(b) [1890] 24 Q.B.D. 712.

(c) [1893] A.C. 326.

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set down for argument before the Full Court. That argument we have heard, and it turned upon what is the proper construction to be given to sec. 84 of the *Customs Act* 1890. This section in terms says that if it shall appear to the Commissioner that in any invoice goods entered for *ad valorem* duty were undervalued with intent to avoid the payment of duty, the goods included in the invoice shall be forfeited. So that, reading these words as they stand, all that is necessary to produce forfeiture is that certain facts and certain motives should appear to the Commissioner to exist. Then it is said that the powers vested in the Commissioner are so large that they cannot have been intended to be as large as the language of the section would denote, and that we should look at the Act as a whole and the other sections specially providing for consequences in several instances of less importance to importers, *e.g.*, innocent misrepresentation of the value of goods. The defendant says that we should conclude by those other provisions that, as to some of them, they should be imported into sec. 84, and as to others of them, that they are so opposed to the large and unlimited construction of sec. 84 that we should restrict it in its literal meaning. Now, we do not say that there are not provisions in this Act which contrast somewhat strangely with these provisions of section 84. There seems to be in some cases a protection given in minor matters which is not given in the case of the more serious acts mentioned in sec. 84. But the question is, is there anything which would justify the very wide departure from the language of this section, and would answer the purpose of the defendant and impose obligations on the plaintiff similar to those in the other sections.

The argument on the defendants' part would be, of course, greatly strengthened if these provisions in sec. 84 were found to be altogether irrational, and produced results not reconcilable with any proper administration of the Act with regard to the safety of the persons coming under these provisions. With reference to these provisions as to undervaluing, we have to look at the language of the provisions in sec. 84, in which the purpose of producing forfeiture is declared and the same words

are used—"shall appear to the Commissioner"—with regard to the intent with which an act is done. Taking the first portion of sec. 84, it has two branches. One is "if any package entered for duty is found to contain goods not mentioned in the entry or invoice;" the other, "if any goods are found which do not correspond with the description thereof in the invoice." That is a matter of fact, and as such would have to be proved before the Commissioner could properly assign a motive to that fact; but the fact itself would be a distinct breach of the Act. The Commissioner's discretion in saying that was done—that the omission was fraudulent and should produce forfeiture of those goods—could only come into force when there is that antecedent fact proved and established in the same way as any other fact: it does not entitle him to forfeit as he chooses. But the law says that, being broken in that respect, if the Commissioner thinks the law broken with a view of saving the duty he can forfeit. The contention for the defendants here is that in that case, as well as in the particular case, it would be necessary for the plaintiff in order to succeed in the action of forfeiture to prove by such evidence as this Court would act upon, not only the fact but the motive for the fact, and the opinion of the Commissioner would go for nothing. Then we come to the branch of the section which affects this action. It is true that there there is a change in the language. All that need appear to the Commissioner is that there has been an undervaluation which has been made with a particular motive. It does not say that if goods are undervalued and it appears to the Commissioner there is an undervaluation with intent to avoid payment of duty he may forfeit, but it puts these omissions as matters which "may appear to the Commissioner." But although that is so we cannot disregard the fact that with reference to undervaluation the *Customs Act* 1890 contains a series of provisions which make that a matter of contest in which the importer can be heard to support his view in the manner provided by the Act, although the decision of the Commissioner upon that subject after hearing the other side is a final decision. Certain consequences follow upon the undervaluation, and with these this Court cannot interfere. Though,

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for reasons which suggest themselves to our minds as satisfactory, the Legislature may have thought it a fitting thing not to limit the Commissioner's powers to cases in which there had been this process under the Act, it may have had and probably did have in mind the fact that the powers would not be exercised unless there had been a mode of ascertaining the real value which the Act provided, or at all events that it was competent for him to resort to that process. His finding involves two points—the one an undervaluation, and the second an undervaluation caused by certain motives—and the Act supplies a means of settling the first point by the procedure which takes place in all cases where there is a difference of opinion between the Customs authorities and the person passing the goods. But the powers of the Commissioner are not limited by his having to require that the antecedent process should be gone through, and there may have been good reasons for the change in language from the first part of the section to which I have referred, leaving not only motives but non-compliance with the law in the hands of the Commissioner, such power being described in the Act by the words “shall appear to the Commissioner.” We think, therefore, although it is manifest that a person may have a decision given against him which he cannot insist shall be decided by other means, that power is conferred upon the Commissioner by language so strong that we feel we are not at liberty to restrict the meaning of the section or to hold that it means less than it says. For that reason we hold that the cause of action exists. We answer the questions in favour of the plaintiff, with costs.

Solicitor for the plaintiff: *Guinness*, Crown Solicitor.

Solicitors for the defendants: *Brahe & Gair*.

R. H. C.

[DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.]

BELTON v. BELTON.

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June 21.

Divorce — Desertion — Petition — Dismissal — Fresh petition — Same ground — Marriage Act 1890 (No. 1166), s. 74.

In 1894 a husband's petition for dissolution of his marriage on the ground of desertion was dismissed. At the same time a cross-petition by his wife for dissolution on the ground of misconduct was also dismissed. Marital relations between the parties were not resumed, although the husband made several attempts to induce the wife to live with him again. In 1898 the husband filed a fresh petition for dissolution on the ground of desertion.

Held, affirming A'Beckett, J. (*ante*, p. 683), that no new desertion had occurred.

APPEAL from a judgment of A'Beckett, J., reported *ante*, p. 683, wherein the facts are fully stated.

Schutt for the appellant—There can be desertion without a resumption of cohabitation. The statement in *Fitzgerald v. Fitzgerald* (a) is merely a dictum.

[HOOD, J. It has been followed many times.

HODGES, J. It is of the very essence of the matter that the parties should have come together since the previous suit.]

That case is distinguishable. There was no attempt as here to resume cohabitation. If the parties separated immediately after the marriage ceremony, then, according to that authority, there could be no desertion.

[HODGES, J. The assumption is that cohabitation means the whole marital relation. There must be an existing status, and although the parties never came under the same roof, the status existed immediately the ceremony was performed—that is to say, they stood in the relation to each other as man and wife. So that if she left him at the church door there would be desertion.

HOOD, J. The learned Judge found in the first case that the wife was wronged, and therefore he would not grant a divorce. The first three years' desertion was rightful on her part, so that at the end of that time the petitioner had to put her in the wrong.]

(a) [1869] L.R. 1 P. & D. 694.

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The petitioner has done everything in his power to get her back.

[MADDEN, C.J. He cannot expiate his offence.]

During argument the following authorities were referred to:—*Weeding v. Weeding and Rose* (b); *Belton v. Belton* (c); *De Laubenque v. De Laubenque* (d); *Johnston v. Johnston* (e); *Collard v. Collard* (f); *Bishop on Marriage*, vol. i., sec. 783.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.] In this case a suit was tried before A'Beckett, J., in which a husband sought a divorce from his wife on the ground of desertion, and his wife sued in a cross-petition for a divorce on the ground of adultery. Both petitions were then dismissed by the Judge, who, as to the desertion, found that the wife, then living apart from her husband, had originally left him justly, and not in a wrongful manner, by reason of his ill-treatment. She has remained separate from him ever since that decree till now, and in precisely the same circumstances as at first. She has done nothing to condone the husband's wrongful act, which made her leave him in a just and proper manner. Since that first unsuccessful suit the husband has made efforts to induce her to resume cohabitation with him, but she has refused to do so. We think then that the result is that the wife's original departure from his roof and society was justified, and she has done nothing since then to make that act unjustified, or to forgive the husband's misconduct and so make her conduct unjustified in the first instance. We think that the husband cannot, by any number of appeals to his wife, or by any other effort upon his own part, make her conduct unjustified or change her attitude from a rightful to a wrongful one. A'Beckett, J., has found, in the second suit for divorce on the ground of desertion by the husband, that the wife was right in leaving him and had done nothing to change her rightful position into a wrongful one. There was nothing new in the meantime which could amount in law or fact to a staying of desertion, so that there

(b) [1890] 16 V.L.R. 596.

(e) [1895] 21 V.L.R. 416.

(c) [1896] 16 A.L.T. 142.

(f) [1896] 2 *Argus* L.R. 21.

(d) [1899] P. 42.

was no desertion entitling the husband to a divorce. We think His Honor's view of the facts is right, and in any case he was entitled to his decision upon the facts, and we think also that in point of law he is right. *Fitzgerald v. Fitzgerald (g)* is clear upon the point. We therefore think this appeal should be dismissed.

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HOOD, J. The desertion of the husband by the wife was found to have been caused in the first instance by the husband's misconduct. The effect of our allowing this appeal would be to say to the wife that she must either condone that offence or be divorced—a course which is impossible.

Appeal dismissed.

Solicitor for petitioner : *J. S. Hobduy.*

R. H. C.

UMPHELBY v. GREY.

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October 5, 6, 7, 10.

A'Beckett, J.

Will—Construction—Powers of trustees—Power of management—Power to carry on station business—Power to buy land—Implied power to rent land—Implied power to accept surrender of a lease by a tenant—Implied power to mortgage in order to carry on business—Implied power to purchase stock—Solicitor also trustee—Profit costs—Costs of solicitor trustee for acting as solicitor to estate in matters other than actions—Costs of solicitor for himself and co-trustees in defending action.

Where trustees under a will have power to manage and carry on a station property, they have power to take a lease of contiguous lands, the occupation of which is almost essential to the beneficial management of the station, especially where the will gives them power to buy outright such lands if they think it advantageous to the estate.

Trustees of a will who lease a property to a lessee who, while the lease is still subsisting, they think may not be able to pay his rent, cannot be said to act in breach of trust by entering into possession of the property by agreement with the lessee if they have an honest belief that it is for the benefit of the trust, although there may be no express power under the will to make arrangements with lessees or to accept surrenders of leases.

A testator who was the owner of a station and the stock upon it, and carried on thereon the occupation of a grazier, died leaving a will which empowered his trustees to carry on the business, and for that purpose to use the capital as well as the income of the estate, pending its realization and the postponed division of his estate. It also gave them power to sell the stock and to let the station.

Held, that the power of carrying on the business was not limited to a continuing of the business immediately after his death, but applied at any time

(g) L.R. 1 P. & D. 694.

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when the property might, after having been let, be unoccupied by a tenant, and under such circumstances authorized them to purchase stock to graze upon it, and for the purpose of making such purchase to mortgage the estate.

A solicitor who is one of several trustees under a will can act as solicitor to the trustees in defending an action for alleged breach of trust, and can charge for his services and obtain ordinary costs; but he cannot charge against the estate profit costs in matters in which he and his partners have acted generally as solicitors to the estate.

ACTION by Ellen Amelia Umphelby and her infant children by Thomas Frederick Umphelby, their next friend, and Charles Edward Ernest Umphelby against Joseph Henry Grey, Edwin Henry Austin, and Herbert Arthur Austin, the present trustees of the estate of the late Thomas Austin, of Barwon Park, and Albert Austin and Austin Albert Austin, for execution of the trusts of the will and codicils of the said Thomas Austin under the direction of the Court, for certain declarations of breach of trust by the trustees, and for accounts and inquiries.

By his will, dated the 16th October 1868, the late Thomas Austin appointed Albert Austin, Austin Mack, and Thomas Millear to be trustees and executors thereof, and after certain specific gifts and a pecuniary legacy of 2000*l.* to his widow, devised his residence with the pre-emptive section on which it was situate and certain adjoining lands to his wife during her widowhood, and he devised all his real estate, subject as to the pre-emptive section to the estate of his wife, and the residue of his personal estate upon trust for sale, conversion, and collection, with a power of postponement of the sale and conversion for such time as to them should seem expedient, and he declared that if his wife should at any time or times before the hereditaments devised to her for her life should be sold elect not to reside thereon the trustees should, during so long time as she should so elect and should cease to reside there, pay to her the yearly rent of 250*l.* in lieu of the use and enjoyment to her of the lands and hereditaments. And he then provided as follows:—"And I empower my said trustees in the meantime and during the suspense of any such sale to demise and lease or join with any partner or partners of mine in demising leasing and letting all my said real and personal estate stations stock and chattels real

or any of them or any part or parts thereof respectively from year to year or for such term or terms of years at and under such rent covenants and conditions as to them shall seem advantageous and proper with power also to let the same real and personal estate stations stock and chattels real or any of them or any part or parts thereof respectively at any valuation or by tender or otherwise as my said trustees in their discretion may see fit or think advisable and for all or any of the purposes aforesaid to make enter into and execute proper and valid contracts demises and leases of or relating to the same respectively. . . . And I also empower my said trustees in their discretion to enter into and take possession of all or any part or parts of my said real and residuary personal estate and to conduct manage and carry on the same either solely or jointly with any partner or partners of mine as aforesaid to the best advantage and for the purposes aforesaid to engage and employ sufficient agents overseers stockmen shepherds servants and workmen and to make out of the income or capital of my same estates such outlay as they may deem expedient and advantageous and for the benefit of my estate." And he declared that his trustees should out of the moneys to arise and be produced as aforesaid from his real and residuary personal estate, and the income, accumulations, and produce thereof, after payment of his funeral, testamentary expenses, and debts in the first place, pay to his wife during widowhood an annuity of 1000*l.*, and subject thereto directed his trustees to hold the said moneys and the income thereof in trust for his children in equal shares, and so that the interest of sons should become absolutely vested when they should respectively attain 21 years, and the interest of daughters when they should respectively attain 21 or marry, and the trustees were to hold the share to which each daughter should become entitled upon trust to pay an equal half-part into the hands of the daughter for her separate use, and as to the remaining half-part upon trust to settle the same on the daughter and after her death on her children. And he made the following provisions:—"Provided always and I direct that my said trustees shall out of the moneys which shall come

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to their hands or hand by any of the means aforesaid pay and satisfy when and so often as the same become payable the yearly or other rents payable for or in respect of any lands held by or for me under Crown leases and of which lands I or some person or persons for my benefit may now or hereafter have the right of acquiring the fee simple. And I also empower my said trustees by and out of the same moneys to lay out and expend such sums as may by them be deemed necessary and proper in making improvements upon any such leased lands. And I also empower my said trustees from time to time to purchase the fee simple of any lands now held by or for me under Crown leases and also in their discretion to purchase any other other lands forming or which may form part of or be contiguous or near to any station run estate or property now held by or belonging to me or which may be held by or belong to me either solely or jointly with any other person or persons." The testator made two codicils to his will, one on the 3rd November 1868, and the other on 21st November 1868, and died on 15th December 1871. Probate of his will and codicils was granted to the executors on 25th April 1872. The testator left a widow, four daughters and four sons. The daughters were—Elizabeth Harding, wife of Doctor William Henry Embling; Harriet Mary Austin, wife of Sydney Austin; Anna Arundel, wife of the plaintiff Charles Edward Ernest Umphelby, and the plaintiff Ellen Amelia, wife of Thomas Frederick Umphelby, and the names of the sons were—Austin Albert Austin, William John Austin, the defendant Edward Henry Austin, and the defendant Herbert Arthur Austin. The testator left considerable real and personal estate. The real estate had not yet been sold. By an indenture dated 7th March 1876, made between the said Thomas Frederick Umphelby of the first part, the plaintiff Ellen Amelia Umphelby (then Austin) of the second part, the said three executors of the third part, and the said Austin Albert Austin and the plaintiff Charles Edward Ernest Umphelby of the fourth part, after reciting that the plaintiff Ellen Amelia Umphelby (then Austin) had out of the half-share directed to be paid to her received 2000*l.* and 1750*l.*, and that a marriage was to be solemnized between her and the said Thomas

Frederick Umphelby, and that the balance of the said half-share and the other half-share were to be settled in the manner in the said indenture appearing, she the said Ellen Amelia Austin assigned and the executors as to the half-share to be settled confirmed to the said Austin Albert Austin and the plaintiff Charles Edward Ernest Umphelby all her share and interest in the testator's estate upon trust for investment, and to pay the income of the half-share directed by the will to be paid to her during her life for her separate use without power of anticipation, and after her death upon certain trusts for her children, and as to the other half directed by the will to be settled to pay the income to the said plaintiff for her separate use without power of anticipation. The plaintiff Ellen Amelia Umphelby was married to the said Thomas Frederick Umphelby on the 8th March 1876, and the plaintiffs Ellen Wilga Marzetti Umphelby, Muriel Maud Marzetti Umphelby, Thomas Austin Umphelby, Vera Yaroda Marzetti Umphelby, Myra Elizabeth Lydia Marzetti Umphelby, and Kathleen Ellice Constance Marzetti Umphelby were the children of the marriage, and were all under 21 years of age. By an indenture dated 26th September 1889 the defendant Albert Austin was, in pursuance of the power contained in the indenture of the 7th March 1876, substituted for Austin Albert Austin as a trustee of such indenture. By an indenture dated 23rd October 1890 the defendants Edwin Henry Austin, Herbert Arthur Austin, and Joseph Henry Grey were, in pursuance of the power contained in the will, appointed as trustees of the will and codicils in place of Albert Austin, Austin Mack, and Thomas Millear.

The statement of claim alleged that the sheep station known as Barwon Park, which was the principal asset of the testator's estate, was leased to Sydney Austin in 1890 for a term of five years ending on the 15th December 1896, at a rent of 6362*l.* 14*s.* per annum. The defendants Edwin Henry Austin, Herbert Arthur Austin, and Joseph Henry Grey on the 7th July 1893 accepted from Sydney Austin a surrender of this lease as from the 15th June 1893, and purchased from him his live stock on the station for 18,221*l.* 1*s.* 6*d.*, and had since carried on and

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managed the business of the station as sheep farmers. For the purpose of purchasing such stock such defendants, on the 23rd July, 1893, borrowed 16,500*l* on the security of two mortgages—one for 10,500*l*., and the other for 6000*l*., and interest at 5½ per centum per annum. The surrender of the lease and the purchase of the stock, and the management of the estate as a sheep farm, and the borrowing of the said moneys, had diminished the estate and caused great loss thereto, and such acts were done in breach of the duty of the trustees under the will and codicils. In addition, or in the alternative, such acts had been done negligently and improvidently, and by the wilful default of the defendant trustees of the will and codicils, and with the view of benefiting Sydney Austin. The said defendants had also paid to the testator's widow out of the income of the estate since the year 1885 the sum of 450*l*. per annum instead of 250*l*. as rental for the use of the pre-emptive section and the other lands devised therewith to the widow. The defendant Joseph Henry Grey was a solicitor, and a member of the firm of Taylor, Buckland and Gates, solicitors, but notwithstanding the premises the trustees had allowed the said solicitors to deduct or receive from the funds of the estate profit costs for work done or alleged to be done for the estate, and also commission for procuring and negotiating the said loans of 10,500*l*. and 6000*l*. The defendant Albert Austin was not willing to be a plaintiff in the action. The defendant Austin Albert Austin was sued, and was authorized by order of a judge to defend the action on behalf of himself and all the persons interested under the will and codicils other than the plaintiffs and the defendants Edwin Henry Austin and Herbert Arthur Austin. The defendant trustees of the will and codicils alleged that all the beneficiaries thereunder, who were numerous, had consented to the breaches of trust aforesaid.

The plaintiffs by their statement of claim claimed execution of the trusts of the will and codicils under the direction of the Court; a declaration that the defendants Grey, Edwin Henry Austin, and Herbert Arthur Austin ought to account for and pay into the funds of the estate all losses incurred by the estate in respect of the matters aforesaid; or a declaration that they

ought to account for and pay to such of the persons interested under the will and codicils as were found on inquiry or otherwise not to have consented to such breaches of trust such share of the amount of the said losses as was properly attributable to their respective interests; or a declaration that they ought to account for and pay to the trustees of the settlement of 7th March 1876 such share of the amount of the said losses as was properly attributable to the interests settled thereby; all necessary accounts and inquiries; a declaration that the said defendants ought to account for the difference between 450*l.* and 250*l.* paid to the testator's widow from year to year for the rent of the pre-emptive section and the other lands devised therewith; and a declaration that the trustees were not entitled to credit for the amount paid or allowed to their solicitors, Messrs. Taylor, Buckland and Gates for costs other than costs out of pocket and for commission. So much of the evidence as is material to this report appears in the judgment.

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Higgins and *Dethridge* for the plaintiffs.

Topp and *Hayes* for the defendants, Joseph Henry Grey, Edwin Henry Austin, and Herbert Arthur Austin, the present trustees of the will and codicils—The plaintiffs have not proved that there is or will be a loss of either capital or income from the alleged breaches of trust. The Court will not, it is submitted, order an inquiry as to what loss has occurred before it is proved that there has been a loss. It is further submitted that there has been no breach of trust. The trustees are given by the will power to carry on the business of the testator as a grazier, even in partnership with others, and it is submitted that that gives them both a power to lease land for the purposes of carrying on and a power to mortgage for the purpose of buying stock wherewith to carry on. The former was decided by your Honor in an unreported case of *McLelland v. Howell* (a) on 26th November 1896.

(a) The circumstances of this case which was of extremely rich soil, growing grass which was so rich as to be unfit made by consent. There the testator to feed young sheep on, as it gave them owned a property called Chocolyn, worms. He purchased for and leased

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[A'BECKETT, J. The question of the power to mortgage was dealt with in a case of *In re Bloxsome's Will* (b), which is very meagrely reported, but from which it would appear that Mr. Justice Owen held that a power to manage and order all the affairs of a station as regarded the carrying on of the testator's grazing affairs included a power to mortgage for that purpose. It may be the learned Judge went on the words "order all the affairs" of the station. It also was a friendly case.]

The executors have full power under the will to manage the estate. These are matters of management of the estate. You can't have a station without stock of some kind. It is therefore submitted that the power of carrying on the station includes the right to purchase stock when for any reason there are not any stock.

[A'BECKETT, J. It seems to have been desirable from the trustees' point of view to have the place in occupation at once. The sheep were on the spot. If there was any doubt as to Sydney Austin being able to pay the amount of his rent from time to time it was the best possible thing to do, and it seems to me improbable that two of the three trustees who had themselves interests should give away money to their relation. There was, I understand, no lease.]

There was no lease; there was merely an agreement embodying certain terms which would have required him to take a lease if desired. There was therefore no real surrender. There was an agreement to put an end to it. If the trustees act in good faith (and there is no suggestion that they did not in this case), and if they do not act negligently (and no negligence has been proved), they have power under the *Trusts Act* 1896, No. 1421, sec. 11, sub-sec. (2) to abandon any debt, claim, or

from his wife another property some miles away, where the grass was better adapted for breeding and rearing sheep, and bred and reared them thereon while young, and then removed them to Choccolyn. He died leaving a will giving power to carry on his business of a sheep grazier, but giving no power to lease land. The lease from his wife having come to an end, and the time

being extremely bad for selling, the interests of all the parties was undoubtedly to carry on the grazing business. It could best be carried on as the testator had carried it on, and the Court, by consent of all the parties interested, sanctioned the trustees taking a lease from the widow at a very considerable undervalue.—Ed.

(b) [1889] N.S.W. 6 W.N. 84.

thing whatever relating to the estate, and for that purpose may give releases. This, it is submitted, gives them authority to accept a surrender of a lease or abandon an agreement with a tenant, especially where there is a power of management given by their instrument of trust. One of two executors may accept a surrender of a lease which they have in right of their testator: *Woodfall's Landlord and Tenant* (15th ed.), 326; *Sheppard's Touchstone* (7th ed.), 303.—*A fortiori* they have power to do so when it is a lease granted by themselves. As to profit costs, these defendants are willing to refund them, as stated in the amended pleading.

[A'BECKETT, J. Those are the costs prior to this action, for acting as trustee to the estate. If they are entitled to the costs of this action out of the estate, will the solicitor trustee be entitled to profit costs of action?]

Yes; he is entitled to appear in an action as solicitor for himself and co-trustees, who are also beneficiaries, and get ordinary costs for so appearing: *Cradock v. Piper* (c), followed in *Re Barber* (d), *Stone v. Lickorish* (e), and other cases. The plaintiff, Mrs. Umphelby, was aware of and concurred in the alleged breach of trust. Under the *Trusts Act* 1896 (No. 1421) she is liable to have her share impounded to make good the breach of trust to the other beneficiaries, and if it is decided that there has been a breach of trust we ask that this should be done. Even if the plaintiffs are successful as to the breaches of trust alleged, the infant plaintiffs should get no costs, as they are joined with an adult plaintiff who concurred therein: *Lane v. Loughnan* (f). Further, the children are not shown to be and probably will not be hurt by any loss arising from the breaches of trust. They are really matters which affect the income and not the capital, except the mortgage, which will probably be paid off long before they became absolutely entitled. They have a contingent interest only, taking nothing unless they attain 21.

Goldsmith for the defendant Albert Austin merely appeared to say that he was not now a trustee of the will.

(c) [1850] 1 Mac. & G. 664.

(d) [1886] 34 Ch. D. 77.

(e) [1891] 2 Ch. 363.

(f) [1881] 7 V.L.R. (E.) 19.

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A'Beckett, J.*Sanderson* for the defendant Austin Albert Austin.

Higgins in reply—The defendants Grey, E. H. Austin, and H. A. Austin are no longer acting as executors. All liabilities of the estate having been long since paid, they are trustees only. As trustees they had no power to mortgage for any purpose. The power of management does not imply either a right to mortgage or to lease property or to accept an abandonment of an agreement of tenancy. The evidence shows that the amounts going to beneficiaries, whether income or capital, has been and will be diminished by the trustees abandoning their rights against Mr. Sydney Austin, who has always been able to carry out his agreement. He had plenty of property, and merely for a time wanted ready cash. There was no dispute between him and the trustees as to rights, and it is submitted that sec. 11 of the *Trusts Act* 1896 only applies to such cases. It is submitted that in any case the consent by the plaintiff Mrs. Austin would not be binding on her. Under the will she is restrained from anticipation. When about to concur in a breach of trust it was the duty of the trustees to protect her from so doing: *Bolton v. Currie* (g). The defence of Grey, E. H. Austin, and H. A. Austin is as trustees and not as beneficiaries, and neither Grey nor his partner was entitled to act as solicitor for them, at all events so as to make profit out of it, nor is he allowed to make profit costs out of other work done for the estate: *Re Barber* (h).

[A'BECKETT, J. The point as to the costs of the action was raised by myself, but I was referred to cases which seem to show that Mr. Grey would be entitled to his ordinary costs. That is my opinion now.]

The principal one of those cases, *Craddock v. Piper* (i) was discussed in *Re Barber*, and, as pointed out by Chitty, J., at p. 81 of that case, the solicitor acted first for himself; secondly, for a co-defendant who was a trustee; and thirdly, for the *cestuis que trust*. Where he is acting for himself and co-trustees in the business of the trust, it is submitted that he is

(g) [1895] 1 Ch. 544.

(h) [1886] 34 Ch. D., p. 81.

(i) [1850] 1 Mac. & G. 664.

not entitled out of the estate to profit costs of an action any more than to profit costs of business of the estate other than an action.

[*Topp*—In *In re Donaldson* (*k*) it is put by Vice-Chancellor Bacon thus :—"I cannot allow that when a solicitor happens to be trustee he is to be treated as for the time being suspended from practice or struck off the rolls so far as regards the matter in which he is a trustee. I do not think he is to be deprived of civil rights because he is a trustee."]

That case has been strongly commented on in *Re Doody* (*l*), where the Court of Appeal showed that they did not approve of the decision in *Cradock v. Piper*, although as the facts of the case they were dealing with did not require it they did not overrule it. An examination of the accounts shows a necessity to have accounts taken, apart from the question of whether the plaintiffs are entitled to the inquiry as to how much has been lost to the estate by the various breaches of trust. It was in any case necessary to bring the action to recover the commission and the profit costs paid to the solicitor before action.

Topp, by permission of the Court, on the question of the costs of a solicitor trustee, referred to *The London Scottish Benefit Society v. Chorley Crawford and Chester* (*m*).

A'BECKETT, J. I shall dispose of this case now, as the parties are here. This is a suit brought by a person interested under a will disposing of a very valuable property, by which she, suing in her own behalf and on behalf of her children entitled in remainder, complains that there have been certain breaches of trust by the trustees of the will—*i.e.*, that they have done things under the will which the will did not authorize them to do; and the plaintiffs further assert that if the will did authorize them they were done negligently and improperly, and with a desire to benefit Sydney Austin, who was released from the obligations of lessee in his interest, and not for the benefit of the estate. Then there is a charge that a certain

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(*k*) [1884] 27 Ch. D., at p. 550.

(*l*) [1893] 1 Ch. 129.

(*m*) [1884] 12 Q.B.D. 452, affirmed
 on appeal [1884] 13 Q.B.D. 872.

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property, which was leased from the widow, was leased from her without any authority, and that this was a breach of trust. The statement of claim alleges also—and that is the most important subject of complaint—that a mortgage by which the money was raised to purchase stock when Mr. Sydney Austin left the property was effected without any authority under the will, and that that was a breach of trust too. I put aside, at present, the complaint affecting certain charges made by the solicitors in respect of commission and profit costs. That is the character of the action. Generally it complains of those things. Getting rid of the least important first, that which affords the least difficulty as to its being within the powers conferred by the will, I come to the complaint that certain property was leased from the widow. That appears to be a charge based on a misconception of what the will meant. The will says that if Mrs. Austin, before the lands and hereditaments devised to her for her life were sold, elected not to reside at or upon the same, the trustees shall pay her, while she ceases to reside there, 250*l.* a year. The plaintiff complains that they have given her 450*l.* a year, and that for the use of the lands without the residence. It is a complete twisting of the provision of the will, and I should say a misconception, to treat it as applying to what occurred. That clause in my view has nothing to do with it. That clause provided that Mrs. Austin might say “I am going out and you must pay me so much.” But Mrs. Austin did not go out. They wanted her to go out, and they made terms with her, and there is nothing to suggest that they did not make the best terms they could. These trustees were beneficiaries acting in their own interest, as well as that of others. I regard Mrs. Austin just the same as if she were an independent person who happened to have a property in the very centre of the estate which the trustees had to manage. For years past it has been so manifestly to the advantage of the carrying on of the estate, whether leased to others or worked by themselves, that terms were made with the widow to use certain lands with a right to use a certain bridge. Assuming that the trustees had power to carry on this business, renting this property and obtaining these advantages from Mrs. Austin were beyond all doubt almost essential to the beneficial

management of the estate. There is not the slightest reason to suppose that, if they could have got land elsewhere, they would not have made themselves independent of her. I think where trustees have a power to manage, and do carry on a station, it would be going too far to say that they have not a power to lease contiguous lands, the occupation of which is almost essential to the beneficial management of the property. I regard with reference to that the provision in this will which enables them to buy straight out contiguous lands if they think it advantageous to the estate, and I think it would be going very far to say that, however advantageous it might be to go outside and pay something for a right-of-way from one man, or to lease a paddock from another, that it would be a breach of trust to do it. Looking to all the powers this will gives, including the power to acquire lands, I think they had power to do this. The evidence is all one way as to that power being exercised reasonably as a matter of business. That is the matter of complaint about which I feel least difficulty.

Then comes the position of affairs which led to these trustees relieving Mr. Sydney Austin of a position which he filled as virtually lessee of this property for so many years. What they then did involves certain distinct operations. The first was to take possession of the property themselves, and by so doing virtually terminate his lease. The circumstances under which that was done were the banking disaster, which changed persons from large property-owners into men having liabilities of the heaviest description—a situation of panic affecting all interests. And under those circumstances Mr. Austin said—"I must raise money on these sheep—they must go. I am not able to pay my liability." That is what he said to the trustees. The trustees have given evidence, and have stated that they had grave doubts as to whether Mr. Sydney Austin would have been able to fulfil his obligations, and that the situation might have resulted in his insolvency if they had sought to compel him to do so. I am not in a position to say whether he would or would not have been able to pay. Perhaps he would. But I believe that those to whom he appealed were guided by a consideration of their own interests, as well as of those they represented, in thinking that it

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would be unwise to take up the position—he being in a position to sell his sheep and to leave the land. His rent was not due till December and this occurred in the middle of the year, and they might view with reasonable apprehension his statement that he might be unable to fulfil his obligations as lessee. Suppose he had not been, and they had done nothing. There was this land, which had lately been cleared of rabbits. The estate had been got into good order and he had there a very valuable flock. They could not go in themselves without terminating his lease. There was this land uncared for, no person looking after it, and the sheep gone, and they would have the hope only of being able to exact from Mr. Sydney Austin in the future the rent. On the other hand there was Mr. Sydney Austin, who knew his business as a sheep farmer, who had thought fit to give a certain rent for the property, and he had a certain flock, and he was willing to sell that at a valuation, and let them do what he had thought would be a good thing for himself to do. The trustees thought it was better not to take chances, but to go in and manage this property themselves, and to buy this stock at a valuation. So far as letting the tenant go that they thought might not be able to pay, and going themselves in, I feel no difficulty. This will was not a well-drawn will in providing in express terms for all the many powers which would have to be exercised. It does not expressly say to “make arrangements with tenants and to accept surrenders,” but, without those words, if lessors let a property and think the lessees may not pay, I do not think they can be said to act in breach of trust by entering into possession of the property they had let to the tenant. If there is an honest belief that it is for the benefit of the trust I do not think they can be said to have committed a breach of trust.

The other is a more difficult point—their powers under this will with regard to carrying on the station business. I need not repeat them. I agree with Mr. Higgins's contention that this clause is not put in in such a separate, independent way as to make it certain that beyond question the testator intended that these powers might be exercised at any time. It is not as distinct an authority as a person desiring to remove doubt

might have given, but it is in terms applicable, and is not in terms subject to any restriction. It authorizes the trustees to use the capital as well as the income of the estate for the purpose of carrying on this business. I think it would be a narrow and illiberal construction against trustees to decide that this power in terms general as to time was to be restricted to the carrying on after the death, and that the trustees not having, after the death, availed themselves of that power, and not having the stock of the testator, were afterwards precluded from using it. Therefore, I hold, it gave them power, and from that fact and the circumstances in which they were placed at that time, I hold that they were justified under the will in effecting this mortgage. If they had come to the Court and asked for the sanction of the Court to do it, I feel no doubt that the Court would have given the sanction. If they were to carry on the business at all, and if they were justified in raising money for the purpose by selling portions of the estate, it would have been simply destructive of the interests of those entitled so to do. It was manifestly the course which any sensible man would have taken, and I think from the terms of the will they had the power. I am warranted in so holding by a decision of the Court of New South Wales in *In re Bloxsome's Will* (n) so far as it goes: I seem to have decided some similar point myself in the case of *McLelland v. Howell*. However, I regard that as comparatively immaterial. Each case as to breach of trust and as to whether trustees were acting within or without their powers is to be regarded with reference to its own circumstances. You are not obliged to disregard the conditions that exist at the time in considering whether an act is or is not within the powers of trustees. The whole surrounding circumstances may be considered by the Court.

Then it is said that this is something injurious. It is a loss to the estate. Those who say it is an injury to the estate have not attempted to prove it. It may be from a legal point of view the plaintiff might say "It is for you, the defendants, to show what is got from that;" but without saying on whom the onus is to show whether it is beneficial or otherwise, I find as a fact

(n) [1889] N.S.W. 6 W.N. 84.

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that it was entered into not improvidently, not with a view to benefit Mr. Sydney Austin, or negligently, but with a view to benefit the beneficiaries under this will. With regard to the income it did not, apparently, benefit them. So far as we see, it probably would have been better for the beneficiaries if Mr. Sydney Austin had been able to fulfil his obligation and had been held to it. The difference arose from a fall in the value of wool and from disease of the stock. But trustees ought not to be punished for that. There has been for a time a diminution of the income of the tenants for life. That is all I can find as to that. In reference to what Mr. Higgins has said: he critically examines the balance-sheets and tells us that things have been charged against income which perhaps should be put against capital. If that be so, that would benefit the tenant for life. Neither she nor her children say that there has been any diminution of corpus. On a proper case made for it, the accounts might be adjusted between the tenant for life and remaindermen; but, because a balance-sheet is open to such criticism, I do not think I should put the estate to the expense of having accounts taken to have matters adjusted. In the same way as to the trustees charging commission for their services. There is no objection raised as to that. There is a good broad charge of breach of trust and negligence; that is what the action is about. Accounts are not asked for trifling matters of this kind. Mrs. Umphelby and her advisers would not put the estate to costs for trifles of that sort. They assert that there is some grave wrong which they wish corrected.

In reference to the costs—a subject of painful interest to the parties concerned—Mrs. Umphelby, the plaintiff, has made an utterly unfounded charge. She says—"I was unduly influenced. Improper influence was brought to bear on me." I do not discredit her statements in the box, but they failed to prove any case of that sort. If a lady was advised she cannot say there was undue influence merely from that. And the person advising was in the same interest as herself. Her husband was there to advise her. There was no suggestion that Mr. Herbert Austin, who was the trustee concerned, was desirous of excluding her from getting any advice from her husband or any-

one else. A case is made that she was in ill-health. I find as a fact that there was nothing of that sort. On her own statement and on her husband's statement there was nothing of the sort.

So far I am against the plaintiff on all subjects of complaint which she prefers, and I think there is no case made out under which I should take this estate in hand and make the trustees responsible for loss, if loss there was.

Then comes another matter. The trustees have paid one of themselves commission which he was not entitled to. They have paid him, he being a solicitor, profit costs which as trustee he was not entitled to. Instead of at once saying in the defence put in that it was so, and that they were willing to put the matter right, there is a foolish denial, due to carelessness. I do not impute any other reason for this slow failure to recognize that a good claim was put into the same pleading with an unfounded claim. Ultimately good sense asserts itself, and at last the defence is amended by stating "Yes, that is so, and the amount shall be given back." That undoubtedly has put the defendants in the wrong, and up to the point at which that offer was made I think the plaintiffs in this action must be regarded as persons who prefer a claim, partly right and partly wrong. In dealing with this question of costs I am not looking about to see who is to be punished, but I am considering this : There are a number of persons who have not done anything objectionable. There is an action in this Court which involves a considerable expenditure of money, and I ought to settle who should pay the costs—that those who have done nothing wrong should not have to pay them. This trifle about the commission and the profit costs as to the amount of evidence involved is a mere atom in a large mass. It is nothing as to the costs incurred by the complainant making unfounded charges, but it was a claim which the law sanctioned. The bad part of the plaintiffs' claim involved incomparably more than the good part of the case. I think the plaintiffs would be properly left up to that time to bear their own costs. After that point I think the plaintiffs should pay the whole costs. Up to that point I think the trustees ought to pay them, and for that they have to

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thank Mr. Grey. In this case he takes commission, which was decidedly legally wrong. Apparently his co-trustees knew of it. When the case is brought he makes a general denial, when he ought not to have denied it. So he has, to use a colloquialism, let the trustees in for these costs, and I have no doubt in settling with them he will see that the co-trustees do not suffer. It is not a matter in which I can deal separately with him. I think the plaintiffs must pay the whole of the costs except those. I think the trustee who was only made a defendant and who appeared to say he was not a trustee should not get costs. I think the others should receive costs from the plaintiffs. In reference to the point raised by himself, on the authorities which have been cited, I think consistently with those authorities that these co-defendants could have rightly asked Mr. Grey to appear for them. He could have appeared for them and could have charged for his services, and there is no doubt the defence could be more economically dealt with by him than by any other solicitor, and I do not think that the mere fact that he appears by himself also with these trustees should affect his right to the ordinary costs which he would ordinarily receive. The judgment will be—order that the defendant trustees repay to and hold in trust for the persons entitled to the income of the testator's estate the sum of so much paid to Taylor, Buckland and Gates for commission, and so much of the sum of the amount paid as represents profit costs. Refer to taxing officer to ascertain the amount of profit costs. Order that the defendant trustees abide their own costs up to and including the amendment of the defence. Order the plaintiffs to pay the costs of the trustees save as aforesaid, to be taxed as between party and party, and that the trustees receive the balance of the costs between solicitor and client out of the estate. Order the plaintiffs to pay the costs of the defendant Austin Albert Austin. Order the defendant Albert Austin to abide his own costs.

The principle that I go on is that persons who make unfounded charges ought not to be allowed to cast costs on those who have not made unfounded charges.

[*Higgins*—The plaintiffs could not get the money out of

Court. It is therefore submitted that they are entitled to the costs of the trial.]

Strictly speaking, that is so. It is only on the supposition that they would be infinitesimal that I am logically right. I think I should make the order in these terms: order the plaintiffs to pay the costs of the trustees save as aforesaid, and save as regards any subsequent costs attributable to the claim for commission and profit costs, and then I should go on to order you to pay the costs of the unfounded charges.

[*Higgins*—A question important to the management of this estate has been decided—namely, as to the power to lease. This should be at the expense of the estate and not of the plaintiffs.]

It would have been a very mischievous action if it had succeeded. I think it ought not to have been brought.

Solicitors for plaintiffs: *Hamilton, Wynne & Riddell.*

Solicitors for defendants, the present trustees: *Taylor, Buckland & Gates.*

Solicitors for defendant Albert Austin: *Whiting & Aitken.*

Solicitor for Austin Albert Austin: *Wighton.*

A. J. A.

CAYRON AND OTHERS v. RUSSELL AND OTHERS (No. 3).

Appeal from order giving leave to appeal to Privy Council—Jurisdiction—Costs.

The plaintiffs brought an action in which judgment was given for the defendants, but costs of certain issues were ordered to be paid by the defendants to the plaintiffs. The plaintiffs appealed to the Full Court, and the appeal was dismissed. From the judgment of the Full Court the plaintiffs then applied to Holroyd, J., for and obtained leave to appeal to the Privy Council. One of the terms of the order giving leave to appeal was that the plaintiffs should give security with regard to the costs ordered to be paid to them by the defendants for the due performance of such judgment which the Privy Council might make with reference to the same. The plaintiffs completed the order giving leave to appeal to the Privy Council by entering into the requisite bonds, and they at the same time lodged notice of appeal from the above-mentioned portion of the order giving them leave to appeal to the Privy Council, the final order being completed at the time of the appeal to the Full Court.

Held, per A'BECKETT and HODGES, JJ., that inasmuch as the plaintiffs had acted under the order giving leave to appeal, and taken advantage of the same, the Court would not entertain an appeal from such order.

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Held, per HOOD, J., that as the final order for appealing to the Privy Council had been obtained the cause was under the control of the Privy Council, and the Full Court had no jurisdiction to entertain the appeal.

Held further, per HOOD, J., inasmuch as the Court had no jurisdiction to entertain the appeal it had no jurisdiction to award costs.

Semble, per A'BECKETT, J. (HODGES, J., dissenting), that the order made by Holroyd, J., was right.

THIS was an appeal from an order made by Holroyd, J., imposing certain terms upon the appellants in granting leave to appeal to the Privy Council. The appellants Cayron and others in an action brought by them against Russell and others had had judgment given against them, but had obtained an order directing them to have costs of certain issues upon which they had succeeded. Cayron and his co-plaintiffs appealed to the Full Court, which dismissed the appeal, leaving the decision of the primary Judge as it stood. Cayron and his co-plaintiffs then applied for leave to appeal to the Privy Council, and Holroyd, J., made an order giving them leave to appeal, but imposed these terms—"That upon the persons respectively in whose favour the costs have been awarded by or by virtue of the said judgment of the Full Court entering into good and sufficient security to the satisfaction of the prothonotary for the due performance of such judgment or order as Her Majesty, her heirs and successors shall think fit to make respecting the same, such persons respectively may be at liberty to carry the judgment into execution, pending the appeal." The appellants applied now to have this portion of the order varied. By an affidavit filed after notice of appeal, it appeared that after the conditional leave to appeal to the Privy Council had been given, security for the amount and for the purpose required by the order had been given by the appellants.

Higgins for the appellants.

Cussen for the respondents—There is a preliminary objection to this appeal being entertained. The final order has been obtained, the security given, and this Court is *junctus officio* with regard to the cause: *Byrnes v. Clough* (a); *Goldsbrough*

(a) [1865] 2 W. W. & A'B. (L.) 17.

v. *McCulloch* (b); *In re Wyatt* (c). The appellants have taken advantage of the order and acted upon it, and cannot now appeal therefrom.

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Higgins—This appeal is not from the final order, but from the conditional order. The Court has power to vary the primary order, and to make it consistent with all the merits of the case. The case of *Goldsbrough v. McCulloch* refers only to a power to rescind an order after it had been properly made, but this is an appeal from an order which has been improperly made. The Appeal Court has jurisdiction to make the order which ought to have been made in the first instance. The affidavit should not be regarded, as it relates to matters which have occurred since the appeal was lodged.

Cussen—The Court has jurisdiction to entertain this application for the purpose of saying that it is an application which should not be granted, and therefore has power to award costs: *Mackintosh v. The Lord Advocate* (d); *Reg. v. Parlbly and others* (e).

Higgins—If the Court has no jurisdiction over the cause it cannot award costs: *Brown v. Shaw* (f); *In re Lister Henry* (g).

A'BECKETT, J. This is an appeal under novel circumstances. It is an appeal from a preliminary order in the process of obtaining leave to appeal to the Privy Council. The plaintiffs, the present appellants, had failed in the action to this extent, that the judgment was given for the defendants, but the plaintiffs had obtained, with reference to certain issues, an order in their favour as to costs. Then an appeal was made to this Court, and in the notice of appeal the plaintiffs intimated that they were satisfied with the judgment in so far as it gave costs of certain issues to them, but dissatisfied with what it had failed to give

(b) [1870] 1 V.R.L. 192.

(c) 2 Ar. Rep., p. 330.

(d) [1876] 2 Ap. Ca., p. 78.

(e) W.N. 1889, p. 190.

(f) [1876] 1 Ex. D. 425.

(g) [1888] 9 A.L.T. 125.

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them in other respects. That appeal was only limited by the statement excepting from the appeal the order made in the appellants' favour as to costs. The appeal to this Court was dismissed, with costs, and from that order of dismissal, which in its operation merely confirmed the order of the primary Judge, leave was sought to appeal to the Privy Council. In exercising the discretionary power which the Judge possessed as to the terms upon which the appeal to the Privy Council should be allowed, with reference to the costs already directed to be paid, the Judge required that if the plaintiffs availed themselves of the order made in their favour as to costs, they should give security for refunding the amount, in the event of their being under a liability to refund by reason of what the Privy Council might order. It is from that portion of the order that this appeal now comes before us. On the appeal being opened the attention of the Court was called, by affidavit, to the fact—which could in no way have surprised the appellants, as it was within their own knowledge and part of their own action—that in pursuance of the order under which this appeal is brought the necessary conditions have been performed, security has been given, and the plaintiffs are now appellants to the Privy Council. The final order has been made under the conditional order, and this conditional order is the subject, practically, of this present appeal. Objection was, no doubt, taken to the reception of the affidavit, though Mr. Higgins has referred to it, and indeed considers that it does not weaken his position as appellant to this Court. We think we are at liberty to regard that fact, so disclosed, in relation to the order from which the appeal is made, and we find as a result of that fact that the present appellants, who have obtained an order in their favour, and have acted upon that order and used it as a first step to the completion of the second step by perfecting security, are now seeking to vary the conditions, and we think that having so availed themselves of that order it is not competent for them now or it would not be right for us now to alter the conditions upon which the preliminary order was obtained. It was pointed out in argument that the conditions which are objected to by the appellants are not

conditions separable from the jurisdiction. It is not as if leave had been given to appeal and the Judge had gone out of his way to do other things; these are all included in the essential part of the application, and were all, in the view of the Judge before whom the matter came, within his discretion. He has exercised his discretion and these conditions were imposed in the exercise of that discretion, balancing one part in favour of the plaintiffs as against another in favour of the defendants, as he ought to have done. That order having been so acted upon we think it should not be disturbed, and we have jurisdiction to say that we should not disturb that order, and also to say that the appellants should pay the costs of this appeal. Cases have been referred to which, on another ground, might be held to preclude us from interfering with this matter. My own view is founded upon the reasons I have stated, without reference to these decisions, and they are, to my mind, quite sufficient, and they form the ground upon which I think we should dismiss the appeal. I am also free to say further, speaking for myself, as to the question of the merits of the matter and the argument that the Judge acted beyond his jurisdiction, that in my opinion he did not. If I felt myself at liberty to enter upon the merits I should say that it was an exercise of the Judge's discretion within his jurisdiction, and a proper exercise of his discretion.

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HODGES, J. I only desire to add that with regard to the merits of the case I am not prepared to express any decided opinion, as I have only heard one side in the argument, but as far as I can form any judgment I think that the Judge's jurisdiction has been exceeded.

HOOD, J. I concur in the judgment, but upon another ground. The appellants have done everything which they were bound to do, and so far I agree with their counsel. But they have done more; they have taken a step which, according to decisions, has removed the cause out of the jurisdiction of this Court. The case has been practically sent to the Privy Council, and is under the control of the Privy Council, and we have no

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right now to interfere with this order. As I think we have no jurisdiction to deal with the case, I think we have no jurisdiction to give costs.

Appeal dismissed with costs.

Solicitor for appellants : *J. Woolf.*

Solicitors for respondents : *Willan & Colles.*

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ADMINISTRATION—*Practice—Regule Generales*, 23rd June 1873—*Rr.* 6, 19—*Company applicant for letters of administration—Affidavit of search for will made by applicant's manager.*] In an application for letters of administration to a company an affidavit by the manager of the company that "he has caused to be made careful inquiry and search for a will" is sufficient, and the manager may cause such inquiry to be made by his proctor. IN RE MCLEAN 528

2. — *Rule to administer freehold land—Administration Act 1872 (No. 427)—27 Vict., No. 230, s. 4.*] A rule to administer the real estate of a person who died intestate before the passing of the *Administration Act 1872 (No. 427)*, may be granted, even though a rule to administer the personal estate of the deceased has already been granted to another person. *In re Wilkinson (5 V.L.R. I. 64)* followed. IN RE GIBNEY 428

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ADMINISTRATION AND PROBATE—*Act 1890 (No. 1060), s. 17—Administration—Surety—Bond—Assignment—Discretion of Court.*] The Court may in the exercise of its discretion refuse to order the assignment of an administration bond where the object of the applicant in seeking the assignment is merely for the purpose of heaping up costs. IN RE KENNEDY 185

2. — (*No. 1060*), s. 99—*Duty on estate of deceased person—Assessment of duty—Appeal from determination of Master in Equity—Evidence on appeal—Practice.*] On an appeal from the determination of the Master in Equity as to the valuation of the estate of a deceased person for probate duty, either party is at liberty to call *vivâ voce* evidence, and will be allowed to use the materials used before the Master. IN RE CROTTY 517

3. — *Parties—Administration and Probate Act 1890 (No. 1060), s. 115—Duty payable on property conveyed in evasion of Act—Parties chargeable with duty—Non-liability of executors for duties on property which never vested in them—Executors.*] An executor cannot be sued for the payment of probate duty on properties

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alleged to have been transferred by the testator with intent to evade the provisions of Act No. 1060. The proper parties to such a suit are those persons who hold the properties so alleged to have been transferred. *THE QUEEN v. AUSTIN* 12

4. — (No. 1060), s. 115—*Probate duty—Transference of property in alleged evasion of duty—Parties chargeable with duty—Liability of executors—Parties.*] An information was laid by the Crown against executors, claiming payment of probate duty on properties alleged to have been transferred by their testator with intent to evade payment of probate duty under Act No. 1060. The executors objected by their defence that no claim existed against them as defendants, and further, that the various transferees of the properties transferred in alleged evasion of the duty were necessary parties:—*Held*, that the executors were necessary parties to the suit, and that in the circumstances of this case the transferees should also be joined as parties. Judgment of MADDEN, C.J. (*ante*, p. 12), disagreed with. *THE QUEEN v. AUSTIN* 335

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ANIMALS PROTECTION—“Cruelty”—*Animals Protection Act 1890 (No. 1064), ss. 3, 9—Overdriving.*] Where overdriving an animal is proved, the effect of secs. 3 and 9 of the *Animals Protection Act 1890* is not to deprive

ANIMALS PROTECTION—*continued.*

the justices of the power to decide whether there has been cruelty within the meaning of sec. 3. They have therefore to consider the whole circumstances under which the overdriving took place in order to satisfy themselves whether or not there has been cruelty. *Biggs v. FITZGIBBON* 548

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APPEAL—*Appeal from order giving leave to appeal to Privy Council—Jurisdiction—Costs.*] The plaintiffs brought an action in which judgment was given for the defendants, but costs of certain issues were ordered to be paid by the defendants to the plaintiffs. The plaintiffs appealed to the Full Court, and the appeal was dismissed. From the judgment of the Full Court the plaintiffs then applied to Holroyd, J., for and obtained leave to appeal to the Privy Council. One of the terms of the order giving leave to appeal was that the plaintiffs should give security with regard to the costs ordered to be paid to them by the defendants for the due performance of such judgment which the Privy Council might make with reference to the same. The plaintiffs completed the order giving leave to appeal to the Privy Council by entering into the requisite bonds, and they at the same time lodged notice of appeal from the above-mentioned portion of the order giving them leave to appeal to the Privy Council, the final order being completed at the time of the appeal to the Full Court:—*Held*, *per A'BECKETT* and *HODGES, JJ.*, that inasmuch as the plaintiffs had acted under the order giving leave to appeal, and taken advantage of the same, the Court would not entertain an appeal from such order:—*Held*, *per HOOD, J.*, that as the final order for appealing to the Privy Council had been obtained the cause was under the control of the Privy Council, and the Full Court had no jurisdiction to entertain the appeal:—*Held further*, *per HOOD, J.*, inasmuch as the Court had no jurisdiction to entertain the appeal it had no jurisdiction to award costs:—*See*, *per A'BECKETT, J. (HODGES, J., dissenting)*, that the order made by Holroyd, J., was right. *CAYBON v. RUSSELL (No. 3)* 997

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ARBITRATION—*Railway contract—Penalties for delay, deduction of—Action on award—Award bad in part—Non-referable items, consideration of by arbitrators.* By a clause in a railway contract it was provided that for every day's delay after a certain day fixed for the completion of the contract the contractors should be liable to the Railways Commissioners in a sum of 15*l.* per day. It was further pro-

ARBITRATION—*continued.*

vided in the same clause that there should be no interference in the operation of this condition unless the Engineer-in-Chief by writing suspended the running of the time fixed or allowed some remission of the fine and unless and until the Engineer-in-Chief should so act by writing as aforesaid, the contractors should not be relieved from their liability for such penalties, nor should the Commissioners be deprived of their right to deduct or set off such penalties. By another clause it was provided that "all matters" left to the decision of the Engineer-in-Chief, and "all claims and demands of every kind . . . by the corporation against the contractors under or arising out of the contract" should be left to the determination of the Engineer-in-Chief subject to the right of the parties if dissatisfied with such determination to proceed to arbitration in a certain way:—*Held*, that the right of the Railways Commissioners to deduct or set off penalties arising through delay in completion of the contract was absolute, and was not subject to the clause providing for arbitration. Where arbitrators have made a bulk sum award, and it appears upon the face of the award that they have decided upon a matter which was non-referable, and where it also appears from the details of the particulars furnished by the contractors that non-referable items have been considered by the arbitrators, the whole award is bad. *FALKINGHAM v. THE VICTORIAN RAILWAYS COMMISSIONERS* . . . 4

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COMPANY—*Companies Act* 1896 (No. 1482), ss. 77, 78, 79, and 80—*Power of company to alter objects or form of constitution*—*Confirmation of alteration by Court.*] In an application under sec. 80 of Act No. 1482 for the confirmation by the Court of alterations in the memorandum of association of a company, the Court will not sanction an alteration which has for its purpose merely the explaining or interpreting of existing articles. The Court is not bound to confirm every alteration passed by the company in conformity with the provisions of secs. 77 and 78 of Act No. 1482, but the Court has a discretion and should exercise such discretion in sanctioning only such alterations which will in a reasonably substantial way enable the company to attain the object set out in sec. 80. *In re THE AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY LIMITED* 613

2. — *Meeting of creditors*—*Companies Act Amendment Act* 1892 (No. 1269), s. 4—*Power of Court to vary the order calling meeting.*] *Quere*, per HOLBOYD, J. Whether the Court has power to alter an order made by the Court directing a meeting of creditors to be held under the provisions of sec. 4 of Act No. 1269. *In re McCracken's Brewery Co. Limited* 784

3. — *Directors of*—*Powers of*—*The Companies Act* 1890 (No. 1074), ss. 76, 77, 78—*Winding up*—*Petition to wind up*—*Directors, powers of to present petition*—*Articles of association, powers conferred on directors by.*] Directors of a company have no general powers which authorize them upon a resolution passed at a meeting of directors to present a petition on behalf of the company to have it wound up. By one of the articles of association it was provided—"The business of the company shall be managed by the directors, who may pay all expenses incurred in . . . registering the company, and may in addition to the powers herein conferred

COMPANY—continued.

upon them exercise all such powers of the company as are under the *Companies Act 1890* or under the regulations for the time being of the company required to be exercised by the company in general meeting, subject nevertheless to the regulations of the company for the time being and to the provisions of the said Act, but no new regulation of the company shall invalidate any prior act of the directors which would have been valid if such regulation had not been made":—*Held*, that the powers conferred on the directors under this article did not empower them in their own discretion and upon their own motion to present a petition on behalf of the company to have it wound up. *In re THE STANDARD BANK OF AUSTRALIA LIMITED* 304

4. — *Member—Allotment of shares—Directors—Appointment—Call—Action—Delay—Acquiescence—Companies Act 1890 (No. 1074), s. 67, Second Schedule, Table A, art. 71.* Sec. 67 of the *Companies Act 1890* should be construed liberally. Where *de facto* directors make a call in the honest belief that they were duly appointed, such a call is valid under the section, notwithstanding the discovery afterwards of a defect in their appointments. *Secus*, where there has been no appointment of directors at all. The judgment of HOOD, J., affirmed:—*Per HOOD, J.* It is the duty of a person who knows that he is considered by the members of a company to be a member of that company and who acts as such to ascertain the nature of the company. Where circumstances occur which are calculated to raise in such person's mind a suspicion that the company is not identical with that which he had agreed to join, but no inquiry is made, and he allows his name to remain on the share register for years, he cannot afterwards repudiate his liability for calls. *ESSENDON LAND AND FINANCE ASSOCIATION LIMITED v. KILGOUR* 136

5. — *Mining company—Action by shareholder—Forfeiture of shares—Non-payment of call—Subsequent redemption—Companies Act 1890 (No. 1074), ss. 241, 247—"Rules of Supreme Court 1884"—Order XIX., r. 27—Order XXI., r. 4.* A shareholder in a mining company failed to pay his call within fourteen days of the date on which the same became due. Subsequently he redeemed the shares by payment of the call:—*Held*, that there was a gap between the forfeiture and the redemption during which he ceased to be a shareholder. The omission of a material allegation in a statement of claim is not cured by an inference of the allegation from the heading of the writ. In an action by a shareholder in a mining company, on behalf of himself and all other the shareholders of the company except the individual defendants, against these defendants and the company, claiming *inter alia* an account and payment of certain secret profits made by the defendants as promoters of the company,

COMPANY—continued.

the fact that the plaintiff is a shareholder must be alleged in the statement of claim; it is not sufficient that the writ and statement of claim are headed as on behalf of himself and all others the shareholders except the individual defendants:—*Semble, per HOOD, J.* If a shareholder in a mining company institute an action as such and forfeit his shares by non-payment of a call and again becomes a shareholder by redemption of the forfeited shares, the fact of forfeiture does not preclude him from succeeding in the action. *BOSTOCK v. EDGAR* 677

6. — *Scheme of reconstruction—Companies Act Amendment Act 1892 (No. 1269)—Undertaking of new company to pay liabilities of old company—Secured creditors.* By a scheme of reconstruction under the *Companies Act*, a new company was formed to acquire all the assets of the old company subject to the liabilities which the new company was to discharge in a manner provided by the scheme. By clauses xii. and xiii. of the scheme every creditor of the old company, save as provided by clause xv., was to take deposit receipts and preference shares in certain proportions. By clause xv. it was provided that "Every creditor of the old company not being a creditor holding a security over any portion of the assets of the old company shall accept the provisions made for him by clauses xii. xiii. and xiv. of this scheme in satisfaction and discharge of all claims against the old company." No specific provision was made in the scheme with regard to the secured creditors, it being at the time considered that the securities were quite sufficient to cover the debts:—*Held*, that although the secured creditors upon finding the securities deficient could not call upon the new company to satisfy the deficiency in the manner arranged under the scheme, yet they retained their rights as mortgagees against the old company which could be enforced against the new company as the purchaser of the equity of redemption, and for this purpose the old company, if necessary, could be compelled to lend its name to enforce such rights. Form of order. *In re THE STANDARD BANK OF AUSTRALIA, EX PARTE THE CITY OF MELBOURNE BANK LIMITED* 289

7. — *Transfer of shares—The Companies Act 1890 (No. 1074), s. 38—Rectification of register—Discretion of Judge—Transfer to man of no means—County Court Act 1890 (No. 1078), s. 99—Sale of shares by bailiff—Right of purchaser to be registered.* By sec. 99 of the *County Court Act 1890* the bailiff may seize and sell shares of a company belonging to the judgment debtor, and "such bailiff or officer shall immediately or as soon after such sale as may be by a sale note transfer every such share to such purchaser and such sale note shall be a good valid and legal transfer of every share mentioned therein to all intents and purposes as if such transfer had been made by the holder of any such share to such purchaser and such

COMPANY—continued.

purchaser shall become and be a shareholder in such company. . . .” A shareholder in a company, desirous of avoiding an anticipated call in such company, made an arrangement under which he was sued in the County Court, judgment obtained against him in default of defence, and seizure made of the shares in the company held by him. In pursuance of such arrangement the shares were sold by the County Court bailiff and bought by a person acting in conjunction with the shareholder for a nominal sum. The purchaser was a man without means. The directors, under the powers contained in the articles of association, refused to register the purchaser as a shareholder. Upon an application by the purchaser under sec. 36 of the *Companies Act 1890* to have the register rectified by placing his name thereon :—*Held*, that under the circumstances of the case the Court was not satisfied of the justice of the case, and the application should be refused. *IN RE McCracken's CRY BREWERY Co. LIMITED (No. 2), EXPARTE QUINLIVAN* 803

8. — *Winding-up—By the Court—Voluntary winding-up—Creditor—Companies Act 1890 (No. 1074), ss. 86, 131.* A compulsory winding-up order against a company will not be granted *ex debito justitiæ* on the application of a creditor of the company where a voluntary winding-up is being proceeded with and it appears that the creditor's rights are not endangered by the voluntary winding-up. A creditor of a company in voluntary liquidation applied for a compulsory winding-up order. The application was refused, but, under the circumstances, an order was made that the winding-up should be continued under the supervision of the Court. *IN RE THE REGENT'S PARK COMPANY LIMITED* 420

9. — *Winding-up—Voluntary liquidation—Mortgage—Interest under covenant—Companies Act 1896 (No. 1482), s. 153.* A trading company executed an instrument of mortgage to secure certain moneys owing by the company, and by a covenant in the deed agreed to pay interest at a certain rate. During the currency of the mortgage the company went into voluntary liquidation. The mortgagee claimed interest accruing since the date of the winding-up :—*Held*, that the claim could not, by reason of the provisions of sec. 153 of Act No. 1482, be allowed. *In re the Irrigable Estates Co. Limited (23 V.L.R. 477)* approved. *IN RE THE MURRAY RIVER STOCK, STATION, AND COMMISSION AGENCY COMPANY LIMITED* 662

— *Mining Company—Cessation of work—Distribution of assets—Miners' wages—Priority of* 721
See *MINES ACT 1897*. 2.

CONDITIONS OF CONTRACT—Contract for execution of works—Final certificate See **CONTRACT**. [70]

CONSIDERATION FOR STOCK MORTGAGE

—Inaccurate recital of consideration—
Valuable consideration 410
See **STOCK MORTGAGE**.

CONSTABLE OF POLICE—Title to property in hands of police—Application as to ownership—Practice 915
See **POLICE REGULATION ACT 1890**.

CONTEMPT—Witness, refusal to answer question—Question tending to criminate 957
See **CORONER**.

CONTRACT—*Construction—Condition—Final certificate—Arbitration—Judicial proceeding—Award—Melbourne and Metropolitan Board of Works Act 1890 (No. 1197), s. 79.* In a contract for the performance of certain works it was provided that after certain progress payments had been made to the contractor, no money should be considered to be due or owing to the contractor, nor should the contractor make any claim for or on account of any work executed or maintained by him unless a certificate that the works have been finally and satisfactorily completed and that the balance was due to the contractor had been given by the superintending officer and countersigned by the Engineer-in-Chief. Under the specification of the works to be done were provisions that certain contingencies were to be provided for by the contractor at his own expense. The superintending officer gave, and the Engineer-in-Chief countersigned, a certificate purporting to be a final certificate, but in the certificate were contained deductions in respect of the matters mentioned in the specification. In an action by the contractor to recover the amount deducted :—*Held* (reversing the judgment of MADDEN, C.J.), that the certificate was merely a certificate in respect of the sum therein certified to be due, and was not a final certificate entitling the contractor to recover the balance of moneys alleged to be due to him under the contract :—*Per MADDEN, C.J.* Sec. 79 of the *Melbourne and Metropolitan Board of Works Act 1890* was not intended to extend the common law liability of the Board of Works. *SHAW v. MELBOURNE AND METROPOLITAN BOARD OF WORKS* 70

— *Workman employed as contractor—Meaning of employed* 953
See **EMPLOYERS AND EMPLOYEES ACT 1891**.

COPYRIGHT—*Register—Rectification—“Person aggrieved”—Copyright Act 1890 (No. 1076), s. 51.* The words “person aggrieved” in sec. 51 of the *Copyright Act 1890* may include the person who caused the entry to be made. *Exparte Poulton and Son (53 L.J. Q.B. 320)* followed. *IN RE HALL'S COPYRIGHT* 702

CORONER—*The Coroners Act 1890 (No. 1077), s. 4—Coroner, jurisdiction of to commit for contempt—Coroner's Court—Witness, refusal of to*

CORONER—continued.

answer—Question tending to criminate—Warrant of commitment, form of.] A coroner has power to commit a witness for contempt in refusing to answer a question pertinent to the inquiry. The powers of a coroner are not limited by the provisions of sec. 4 of Act No. 1077. A warrant of commitment following the form set out in the Second Schedule to Act No. 1077 is sufficient although it does not state that the inquisition was held in the presence of jurors. *IN RE O'CALLAGHAN. IN THE MATTER OF THE CORONERS ACT 1890* . . . 957

CORROBORATIVE EVIDENCE—Perjury—

General assignment of—Direct evidence of several witnesses . . . 812
See CRIMINAL LAW. 6.

COSTS—Taxation—Costs of the day—Adjournment of trial—Counsel's fees for the day—Subpoena duces tecum, resealing of.] Where a party has been allowed the costs of the day upon an adjournment of the case from one day to another day in the same sittings, he is not entitled to the fees marked on counsel's brief, or any portion thereof, as costs of the day:—*See*, the proper course would be to pay counsel for the work done on the day, and to allow the fees upon the brief to stand over until the trial of the cause. Where a case has been adjourned from one day to another day in the same sittings, it is not necessary to reseat the subpoena duces tecum, and the costs of such resealing will not be allowed as part of the costs of the day ordered to be paid upon such adjournment. *MACKELLAR v. MACKELLAR* [456

2. — *Taxation of costs—Practice—Party and party—Originating summons—"Instructions for brief"—"Clerk's fee"—"Trial"—"Action"—"Consultation"—"Conference"—"Rules of Supreme Court 1884"—Order LXV., r. 27 (45)—Scale of costs.*] Upon the taxation of the costs of an originating summons as between party and party the item "instructions for brief" will not be allowed. Where there is no contest as to facts there is no trial, and consequently on taxation of costs as between party and party no "managing clerk's fee" will be allowed. *In re HILL. HILL v. DURHAM* [918

3. — *Taxation—Solicitor acting for an agent of company—Costs of agent not costs of company—Legal Profession Act 1891 (No. 1216), s. 8—Counsel's fee—"Substantial attendance" to case by counsel.*] The plaintiff sued a foreign company in respect of a contract to purchase goods ordered by the plaintiff from an agent of the company. The writ was served as substituted service upon the agent. The agent stated that he was not authorized by his appointment to accept service of a writ or to enter an appearance, and he instructed a solicitor, S., to apply to set aside such service. An order was made setting aside such service, and

COSTS—continued.

the plaintiff appealed therefrom to the Full Court. Notice of appeal was served upon the same solicitor, S., who had appeared as instructed by the agent, and S. again wrote, stating that he was not authorized to accept the same on behalf of the company, and that the plaintiff could proceed at her peril. The plaintiff's solicitor by letter informed S. that the appeal was not to be proceeded with. S. then wrote, asking for payment of costs, and stating that if this were not done he would move to have appeal dismissed. The plaintiff's solicitor wrote agreeing to pay the taxed costs, but in the meantime S. served notice of motion to have appeal dismissed, and it was then agreed that this latter motion should be allowed to lapse without costs on either side. Counsel was briefed to appear on the appeal before the Full Court before the notice of the abandonment of the appeal, and he appeared and the appeal was dismissed with costs to be paid to the defendant company. S. then had the defendant company's costs taxed under the order of the Full Court. Upon a summons by the plaintiff that the taxation be reviewed on the ground that the costs incurred by S. were the costs of the agent and not the costs of the company:—*Held* (affirming the judgment of HOOD, J., A'BECKETT, J., *dissenting*), that S. was acting for the agent, and that the taxed costs incurred by him were not the costs of the company, and that the plaintiff was not bound to pay the same:—*Per* HOOD, J. That sec. 8, sub-sec. (1) of Act 1216, which provides for the return of fees by counsel who has not given substantial attendance to a case, does not apply where the brief has been delivered and the action is settled or compromised before or at the hearing. *PEABCE v. TOWER MANUFACTURING AND NOVELTY COMPANY (No. 2)* . . . 757

— Appeal from Judge to Full Court—Party and party costs—Judge's notes—Copy order of dismissal—Third copy . . . 546
See PRACTICE. 6.

— Costs of wife—Payment into Court—Neglect of husband to pay into Court—Practice . . . 940
See PRACTICE DIVORCE. 5.

— Costs of wife—Neglect of husband to pay into Court . . . 942
See PRACTICE DIVORCE. 6.

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— *Donatio mortis causa*—Rule as to costs—Subject of donatio large . . . 576
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— Foreign procedure—Liquidated demand under 50l.—Service of writ abroad 65
See PRACTICE. 16.

— Previous action—Trial by jury—Joinder of claims . . . 929
See PRACTICE. 32.

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See WILL. 10.
- Prosecuting officer—Shire council—*Mandamus* 910
See LOCAL GOVERNMENT. 3.
- Rehearing before Judge of Supreme Court—County Court action—Scale of costs—Counsel's fee 190
See PRACTICE. 5.
- Scale of—Supreme Court—County Court—Foreign procedure—Liquidated demand under 50*l.*—Service in Western Australia 555
See PRACTICE. 15.
- Security for—Discovery, security for costs of—Dispensation with security— 485
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- Taxation of—Bill of costs—Withdrawal of—Practice 440
See SOLICITOR.
- Taxation of—Registrar's taxation—Review of—Appeal from order of Judge of County Court 41
See PRACTICE COUNTY COURT. 2.

- COUNSEL**—Fees to—"Substantial attendance" by counsel—Settlement of case—*Legal Professions Act 1891* 757
See COSTS. 3.
- Fees to—Costs of the day—Adjournment of trial—Subpena *duces tecum*—Re-sealing 456
See COSTS.

COUNTY COURT—*Appeal—County Court Act 1890 (No. 1078), s. 134—Appeal without stating special case—Points of law raised at trial.*]
By sec. 134 of the *County Court Act 1890* any party to an action in the County Court may appeal to the Supreme Court by motion instead of by special case, provided that at the trial of such action the Judge at the trial has, at the request of either party, made a note of any question of law raised at the trial and of the facts in evidence in relation thereto and of his decision thereon. In an action of detinue the defence raised at the trial was that the goods were not the property of the plaintiff. The evidence in relation to such defence was fully taken, but beyond noting the defence raised the Judge took no note of any point of law raised, and the Judge decided that the goods were the property of the plaintiff:—*Held*, that the defendant was entitled to appeal by way of motion under sec. 134, and that the provisions of the section had been fully complied with. *BUCKLAND v. COUSINS* 408

2. — *County Court Act 1890 (No. 1078), s. 51—Remitting action of tort to County Court—One of two co-defendants out of jurisdiction—Right of one defendant to have action remitted to*

COUNTY COURT—continued.

- County Court.*] In an action of tort against two defendants, where one of the defendants is resident out of the jurisdiction, the defendant resident within the jurisdiction is entitled to apply for an order under sec. 51 of the *County Court Act 1890* calling upon the plaintiff to show cause why the action should not be remitted to the County Court. But *semble*, per A'BECKETT, J., it is a good ground for not remitting such action to the County Court that one of such co-defendants is resident out of the jurisdiction. *OWEN v. WHITEHURST* 540
- Appeal from—Taxation of costs—Costs in the action—Costs of the trial 41
See PRACTICE COUNTY COURT. 2.
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- Foreign procedure—Liquidated demand—Service in Western Australia—Costs 555
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- Rehearing before Judge of Supreme Court—Scale of costs—Discretion of taxing officer—Amendment of certificate of Judge's associate 190
See PRACTICE. 5.
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See INCOME TAX.
- COVENANT IN LEASE**—Sewerage expenses—"Charge" upon demised premises 491
See LANDLORD AND TENANT.

CREDIT OBTAINED BY FRAUD—Debtor's summons—Neglect of debtor to appear on return of summons—Evidence to prove fraud 932
See IMPRISONMENT OF FRAUDULENT DEBTORS *Act 1890*.

CRIMINAL LAW—*Admissibility of evidence—Evidence of criminal acts other than those charged.*] A prisoner was charged with the offence of maliciously wounding with intent to do grievous bodily harm. At the trial it was proved that a constable saw the prisoner with a bag, stopped him and asked him where he was going; that the prisoner thereupon ran away, but was caught by the constable and brought back, and when the constable began to examine the contents of the bag the prisoner ran away again, and on being pursued turned round and struck the constable on the head. The bag contained 19 pigeons and a claw-hammer. The prisoner escaped, but was afterwards arrested. A question of the identity of the prisoner was raised at the trial. For the prosecution a witness gave evidence that he had been robbed of 19 pigeons and a claw-hammer the night before the offence charged; that the pigeons were returned to him, but that he could not identify the prisoner nor the claw-hammer. The jury found the prisoner guilty of unlawfully wounding:—*Held*, that the

CRIMINAL LAW—continued.

evidence of the theft of the pigeons and claw-hammer was admissible. *Per A'BECKETT, J.* That even if such evidence were inadmissible it was of such a nature that it could not affect the mind of the jury to the prejudice of the prisoner upon the charge of maliciously wounding with intent to do grievous bodily harm. *Makin v. Attorney-General of N.S.W.* ([1894] A.C. 57) discussed. *REGINA v. LUDLOW* 98

2. — *Crimes Act 1890 (No. 1079), s. 56—Abortion—Supplying drugs with intent that they should be used to procure abortion.*] A prisoner was tried on a presentment framed under sec. 56 of the *Crimes Act 1890* for supplying a noxious thing knowing that the same was intended to be unlawfully used or employed with intent to procure a miscarriage. The evidence showed that the police laid a trap to catch the prisoner, and wrote a letter stating that a woman was three months with child, and asking for something to cure her, but there was no such woman in fact. In reply, the prisoner, believing that there was such a woman, sent certain pills containing half a drop of a certain drug. Witnesses for the Crown described the pills as being dangerous to a pregnant woman; they might injure one woman, though not another. Witnesses for the prisoner stated that the pills were harmless. The learned Judge, in directing the jury, told them that the offence charged might be committed although there was no existing woman in question, and that the prisoner would be guilty if he unlawfully supplied a poison or noxious thing knowing or believing at the time that it was intended to be used with the intent of procuring a miscarriage, even though it now appeared that no such intent actually existed in anyone's mind, and that the prisoner's belief as to the effect of the thing supplied was beside the question, for if he unlawfully supplied a noxious thing, knowing or believing it was to be used for an unlawful purpose, his opinion that such thing was not noxious would not excuse him. The prisoner was convicted:—*Held, per MADDEN, C.J., HOLROYD and HODGES, JJ. (WILLIAMS, A'BECKETT, and HOOD, JJ., dissenting),* that the direction to the jury was wrong, and the conviction should be set aside; *WILLIAMS, J.,* affirming the conviction, on the ground that *Reg. v. Hillman* (9 Cox 386), being a decision of the Criminal Court of Appeal of England, should be followed. *Reg. v. Drake* (13 V.L.R. 498) overruled. *Reg. v. Hillman* (9 Cox 386) and *Reg. v. Tisley* (14 Cox 502) not followed. *REGINA v. HYLAND* 101

3. — *Evidence—Perjury—Finding of jury at former trial, whether admissible in defence at subsequent trial.*] At a trial for housebreaking and stealing prisoner swore an *alibi* and the jury acquitted him. On a presentment for perjury with regard to this *alibi*:—*Held,* that the jury in the trial for perjury were properly directed that they had no concern with the proceedings

CRIMINAL LAW—continued.

at the trial where the prisoner was acquitted, and therefore the fact that the previous jury might have believed the plea of *alibi* was no defence in the trial for perjury. *Reg. v. McDermott* 636

4. — *Evidence—Statement by prisoner—Admission of statement of previous conduct of prisoner.*] Prisoner was presented and found guilty on a charge of incest with his daughter. Prisoner made a written statement that on a previous occasion, some months before, he had committed a grossly indecent act on the person of this daughter, and had attempted to do so on another occasion. Counsel for prisoner raised as a defence that in all the circumstances of the case it was impossible and incredible for a man to commit the offence with which the prisoner was charged:—*Held,* that to meet this defence the statement of his former conduct was properly admissible in evidence against the prisoner at the trial. *Reg. v. BECHAZ* 639

5. — *Felony—Accessory before the fact—Instigator—Probable consequence—Crimes Act 1890 (No. 1079), s. 303.*] The prisoners—a man and a woman—desired to procure abortion upon the body of a pregnant woman by means of electricity and the injection of a certain fluid. While the woman was endeavouring to procure abortion by means of the injection the subject of the operation died. According to the medical evidence the cause of death was suffocation, and there was evidence from which the jury might infer that the suffocation arose from an attempt by the woman to stifle the patient's screams. Upon the trial of both prisoners for murder the jury convicted the man as well as the woman:—*Held,* that the attempt to stifle the screams was an ordinary consequence of the operation, and that the man was rightly convicted as an accessory before the fact. *REGINA v. RADALYSKI* 687

6. — *Perjury—Corroborative evidence—Direct evidence of several witnesses.*] A prisoner was charged with having committed perjury. The perjury consisted in the prisoner having sworn that she had had no beer in her possession since coming out of gaol. Three witnesses were called for the prosecution, each of whom swore that on different occasions, all such occasions being since the prisoner had come out of gaol, he had been supplied with beer by the prisoner. There was no evidence to corroborate the evidence of each witness as to each occasion:—*Held,* that the evidence was sufficient to sustain the charge of perjury. *Reg. v. Hall* (16 V.L.R. 503) distinguished. *Reg. v. ALLSOP* 812

7. — *Possession of stolen wood, posts, etc.—Crimes Act 1890 (No. 1079), s. 102.*] By sec. 102, if any post, etc., be found in the possession of any person or on the premises of any person with his knowledge, and such person being summoned before a justice shall not satisfy the

CRIMINAL LAW—continued.

justice that he came lawfully by the same, he shall on conviction by the justices forfeit and pay over and above the value of the article so found any sum not exceeding two pounds:—*Held*, that the words “came lawfully by the same” mean “came honestly by the same.” The defendant employed a contractor to put up a fence for him. The contractor in erecting the fence took posts belonging to the prosecutor; and subsequently the prosecutor called upon the defendant and demanded the return of the posts or the price thereof. The defendant refused to return or to pay for the posts. The prosecutor then proceeded under sec. 102 of the *Crimes Act 1890*. The defendant in his evidence stated that he had no knowledge where the posts came from. The justices convicted the defendant and ordered him to pay the price of the posts:—*Held*, that upon these facts the defendant was improperly convicted. *HODGSON v. COLLIER* 28

— *Larceny—Justices—Summary jurisdiction—Admission of guilt—Evidence* 445
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CROWN LAND—Land under lease from the Crown—Cutting timber—Proclamation forbidding the cutting of timber 24
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CROWN LESSEES—Miners’ right—Holder of—Right to test Crown lease . 165
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CROWN, MINISTER OF THE—Direction to prosecute alleged offenders—Amendment of Minister’s authority . 785
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“**CRUELTY**”—Overdriving—Duty of justices—Circumstances under which overdriving took place 548
See *ANIMALS PROTECTION*.

CUSTOMS ACTS—1890 (*No. 1161*), s. 84; *No. 1471*, s. 9—*Powers of Commissioner of Customs—Invoice—Goods—Forfeiture—Undervaluation.* [Where it appears to the Commissioner of Customs that foreign goods entered at the Customs for *ad valorem* duty are in an invoice or entry produced by the importers undervalued, all such goods are, under sec. 84 of the *Customs Act 1890*, forfeited, or liable to be forfeited, to Her Majesty. *ATTORNEY-GENERAL v. JULES RENARD AND COMPANY* 970]

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in dispensing with security . . . 485
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Judgment for costs—"Party entitled"
—Order XLII., r. 32 . . . 424
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DIVORCE PRACTICE—Desertion—Petition
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DIVORCE RULES OF 3rd FEB. 1885—
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Extension of time for answer—Practice
See PRACTICE DIVORCE. 7. [519]

— Divorce Rules 1885, r. 10. . . 827
See PRACTICE DIVORCE. 3.

DOG ACT 1890—(No. 1084), ss. 15, 20, 25—
Penalty—Informant—Local authority—Jurisdiction—Justices Act 1890 (No. 1105), Part V.,
ss. 59, 73, 79.] In a proceeding under the *Dog*
Act 1890, sec. 20, to recover a penalty it was
shown that the informant, the person attacked
by the dog, had no interest in the penalty, and
was not an officer authorized to prosecute by
the municipality in which the alleged offence
occurred:—*Held*, that he was not entitled to
prosecute:—*Held also*, with doubt, on the
authority of *R. v. Charles* (3 W. W. & A'B. (L.)
52), that the information should have been
struck out as being without jurisdiction.
LOFT v. WADE (No. 2) . . . 216

DONATIO MORTIS CAUSA—Bank
deposit receipt—Imperfect gift—Property not
passing by mere delivery—Illness of donor—
Expectation of recovery—Costs—Rule as to costs
where subject matter of *donatio* is large proportion
of estate, and where it is small—Remarks
upon nature of proof of *donatio mortis causa*—
Evidence.] Where persons on their death-bed or
believing they are about to die make a gift of
property not passing completely by the mere
handing over (as of a non-transferable bank
deposit receipt), the Court has given effect to
it as a *donatio mortis causa*, and has caused
the executors of the donor to complete the
donor's intended bounty. There may be a
good *donatio mortis causa* of a non-transferable
bank deposit receipt by the mere handing of it

DONATIO MORTIS CAUSA—*contd.*

over to another by way of gift by a person
not expecting to recover from an existing ill-
ness, although nothing is said as to the donor
getting it back in case of recovery. If a person
makes a gift by way of *donatio mortis causa* of
a large proportion of his estate, under circum-
stances which justify his executors in requiring
the donee to prove his claim in Court, the
costs of an action by the donee, by which he
proves his claim, should come out of the whole
estate, including the subject matter of the
donatio mortis causa; and where the subject
matter was one-fifth of the whole estate, the
Court, as a rough equalization of the respective
costs, left the donee to abide his own costs and
ordered the costs of the executors and of the
beneficiaries under the will to come out of the
estate other than the subject-matter of the
donatio:—*Semble*, the general rule would be
that the whole costs should come out of the
rest of the estate where the subject matter
of the *donatio mortis causa* was but a small
proportion of the whole estate. The Court upon
a question of *donatio mortis causa* will accept
evidence of previous statements of the alleged
donor that might be given in a testamentary
cause. *CARTLEDGE v. HEALES* . . . 576

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the Crown . . . 387
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tors . . . 12
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**DUTY ON ESTATE OF DECEASED PER-
SONS**—Assessment of duty—Appeal
from determination of Master-in-Equity
—Practice . . . 517
See ADMINISTRATION AND PROBATE
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EASEMENT OF DRAINAGE—Implied grant
—Crown lands—Drainage . . . 387
See WATER ACT 1890. 2.

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law, trial of . . . 405
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EMPLOYER AND EMPLOYEE—Wages,
contract as to—Employment at lower
wages than log rate—Intention to
evade Act . . . 1
See FACTORIES AND SHOPS. 2.

EMPLOYERS AND EMPLOYEES ACT—
1891 (No. 1219), ss. 3, 5—Meaning of *employe*
—*Workman working as independent contractor*—
Jurisdiction of justices.] A. agreed with B. to

EMPLOYERS AND EMPLOYEES ACT—*contd.*

do certain work for B.—to paint some trucks according to specification. B. accepted this offer :—*Held*, that this was a contract whereby A. was not bound to do any of the work personally but might get it done by deputy ; that therefore he was not an *employé* within the meaning of sec. 3 of the Act No. 1219, and consequently the justices had no jurisdiction under sec. 5 of the Act to adjudicate upon a dispute between A. and B. touching the contract. *McElroy v. AUSTRALIAN FORGE AND ENGINEERING COMPANY PROPRIETARY LIMITED* 953

ESTOPPEL — *Res adjudicata* — Dismissal by justices — Certificate of dismissal — Case not heard on merits 214
See JUSTICES OF THE PEACE.

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FACTORIES AND SHOPS — *Closing of shop* — *The Factories and Shops Acts 1890*, 54 *Vict.* (No. 1091), s. 46, *Schedule IV.*; 1896, 60 *Vict.* (No. 1445), 3 (b); 1898, 62 *Vict.* (No. 1597), s. 2, 7, 9 — *Shop* — “*Closed*” — *Hairdresser* — *By-law* — *Validity* — *Admission*.] The defendant, a hairdresser, was charged upon information with a breach of the *Factories and Shops Act 1890* for that not being licensed to keep open after 7 o’clock in the evening he did not close his shop from that hour. At the hearing before a court of petty sessions the prosecuting solicitor admitted the existence and operation of a by-law allowing hairdressers to keep open until 8 p.m. The justices convicted the defendant for not having closed his shop at 7 o’clock :— *Held*, that the conviction was bad :— *Semble*, per WILLIAMS, J. The validity of a by-law cannot be attacked in such a proceeding, or upon an order to review it, by reason of the provisions of sec. 9 of the *Factories and Shops Act 1898* :— *Semble*, per WILLIAMS, J. Where the time for closing his shop is fixed a hairdresser may not after that hour commence to shave or dress the hair of a customer. *Ellis v. Horsley* (23 V.L.R. 609) distinguished. *POWELL v. KIERULF* 351

2. — *Factories and Shops Act 1896* (No. 1445), s. 15 (8) — *Employment at lower rate of wages than log rates* — *Intention to evade Act* — *Dispute as to liability for particular rates* — *Wages, contract as to*.] An employer, relying upon an alleged contract made without any intention to evade the provisions of the *Factories and Shops Act 1896*, who honestly disputes his liability to pay a particular or log rate of wages, is not liable to be convicted for a breach of the provisions of sub-sec. 8 of sec. 15 of Act No. 1445. *HALL v. BARTLETT* 1

FACTORIES AND SHOPS—continued.

3. — *Factories and Shops Act 1890 (No. 1091), s. 61—Proceedings against offenders to be directed by Minister—Amendment of Minister's authority—Order nisi to review.* A court of petty sessions upon proceedings for an offence under the *Factories and Shops Acts* has no power to amend the direction of the Minister given under sec. 61 of Act No. 1091 to take such proceedings. *ELLIS v. WING LEE* - 785

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FURNITURE—Tenant for life of—Danger of loss—Security against loss—Remainderman—Executor - 567
See WILL. 9.

GAMING AND WAGERING—*Betting*—“Place”—*Evidence*—*Movable box*—*Police Offences Act 1890 (No. 1126), s. 49.* A movable chattel may constitute a “place” within the meaning of sec. 49 of the *Police Offences Act 1890*, by reason of the fact that it may temporarily appropriate a piece of ground for the purpose of betting, and whether there has or has not been such an appropriation is for the justices to determine. *Gleeson v. Adams* (20 V.L.R. 229) applied. *O'DONNELL v. O'BRIEN* - 673

GARNISHEE PROCEEDINGS—Attachment of debt—Delay in the making application for prohibition—Practice - 173
See PROHIBITION.

HAIRDRESSER—Closing of shops—By-law—Validity of - 851
See FACTORIES AND SHOPS.

HEALTH—*Health Act 1890 (No. 1098), s. 35—By-law—Purveyor of milk—Registration.* A by-law was passed in the Town of Northcote under the provisions of the *Health Act 1890* whereby every person carrying on the trade of a cowkeeper, dairyman, or purveyor of milk is required to register himself with the Local Board of Health. The defendant, who kept a farm in the shire of Morang, had been accustomed for many years to send milk by a common carrier to L., in Northcote, who retailed it to customers in Northcote. L. sometimes sent orders to the defendant, but as a rule the defendant, knowing the quantity required, regularly supplied L. with milk, delivery in each case being made by the carrier, who also carried milk for other farmers. The defendant, who was not registered in Northcote, was prosecuted for not having so registered himself as a purveyor of milk in Northcote, and was fined:—*Held*, that under these circumstances the defendant was not a purveyor of milk, and that registration was not necessary. *WHITE v. HARMER* - 513

2. — *Health Act 1890 (No. 1098), s. 35—By-law—Registration—“Purveyor of milk”—Place of registration.* An information was laid against defendant for carrying on the trade of a milk purveyor within the jurisdiction of the local council of Port Melbourne without having registered himself there under the provisions of a by-law requiring every purveyor of milk to

HEALTH—continued.

register himself as to "every place within the jurisdiction of the local council at which such trade or any part of it is to be carried on." The defendant had no place of business nor depôt in Port Melbourne, but was registered in respect of a place within the jurisdiction of another local council. The defendant drove a milk cart through Port Melbourne and sold and delivered milk to his customers there :—*Held* that, although the defendant had no depôt nor place of business in Port Melbourne, he had not committed a breach of this by-law, that he need not register himself under it, and that he could not be fined for carrying on the trade of a purveyor of milk within the jurisdiction of the Port Melbourne council. *Ryan v. Beadle* (23 V.L.R. 164) disagreed with. TAYLOR v. RIGBY 787

3. — *Nuisance—Health Act 1890 (No. 1098), ss. 216, 221, 223, 226—Offensive trade or business—Negligence in carrying on offensive trade.* Under Part X. of Act No. 1098, Division I., sec. 221, any person neglecting to keep his premises in such a state as not to be a nuisance may be convicted of an offence. Under Part X., Division II., sec. 226, any person carrying on an offensive or noxious trade in such a way as to become a nuisance may be convicted of an offence. A person registered under Division II., and carrying on an offensive trade, was charged, under sec. 221, with neglecting to keep his premises in such a state as not to be a nuisance. It was found as a fact that the business, even if carried on in a proper and clean way, would have been a nuisance; but it was also found as a fact that the defendant had kept his premises in an unnecessarily dirty state :—*Held*, that the defendant was properly charged and convicted under sec. 221. COLVILLE v. DALE 590

— Article of food—Nature and composition
— Adulteration 429
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HIGHWAY—Water pipe in—Service pipe—
Leak in—Obligation to repair—*Metro-
politan Board of Works Act 1890*—
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HUSBAND AND WIFE—Attachment of person—Practice—Disobedience of order—Divorce—"Decree"—Alimony—Discretion—*Marriage Act 1890 (No. 1166), ss. 84, 85, 86, 87, 88—Imprisonment of Fraudulent Debtors Act 1890 (No. 1100), s. 3.* Where the Court having jurisdiction over the subject matter makes a wrong order, nevertheless, while such order stands, it is the duty of the Court to enforce it. *Gilchrist v. Gilchrist* (17 V.L.R. 724) applied. The Court has no power under sec. 87 of the *Marriage Act 1890* when pronouncing a decree nisi for dissolution of marriage to order a certain weekly sum of money to be paid by the respondent forthwith for the maintenance of his

HUSBAND AND WIFE—continued.

wife. *Beck v. Beck* (17 A.L.T. 202) disapproved. NISBET v. NISBET AND THE ATTORNEY-GENERAL [340]

2. — *Marriage Act 1890 (No. 1166), s. 74 (a)—Desertion—Denial of conjugal intercourse—Divorce.* In a suit for divorce by the husband against his wife the following facts were proved :—(a) For three years and upwards matrimonial intercourse had not taken place between the parties, owing to the refusal of the respondent, such refusal being wilful and deliberate and without any cause or excuse; (b) for three years and upwards the respondent had habitually locked herself from about the hour of 8 p.m. to 8 a.m. in the bedroom which she occupied apart from her husband; (c) for three years and upwards the parties had not been on friendly terms, nor had they spoken to one another, owing to the conduct of the respondent; (d) the petitioner had been in no way to blame, and the respondent had acted contrary to his wishes; (e) during the aforesaid period the parties had occupied the same building :—*Held*, that these facts constituted evidence of desertion, and that the petitioner was entitled to a decree nisi for dissolution of marriage. SIMONS v. SIMONS 348

3. — *Divorce—Desertion—Petition—Cross petition—Dismissal—Fresh petition—Same ground—Marriage Act 1890 (No. 1166), s. 74.* In 1894 a husband filed a petition for dissolution of his marriage upon the ground of desertion. His wife filed a cross petition for dissolution on the ground of misconduct. Both petition and cross petition were dismissed. There was no resumption of marital relations, the wife resisting all attempts of the husband in that direction and concealing herself from him. In 1898 the husband filed a fresh petition for dissolution upon the ground of desertion :—*Held*, that no new desertion had occurred, the old offence continuing :—*Held also*, following *Fitzgerald v. Fitzgerald* (L.R. 1 P. & D. 694), that there could be no desertion which did not terminate an existing cohabitation. BELTON v. BELTON 683

4. — *Divorce—Desertion—Petition—Dismissal—Fresh petition—Same ground—Marriage Act 1890 (No. 1166), s. 74.* In 1894 a husband's petition for dissolution of his marriage on the ground of desertion was dismissed. At the same time a cross petition by his wife for dissolution on the ground of misconduct was also dismissed. Marital relations between the parties were not resumed, although the husband made several attempts to induce the wife to live with him again. In 1898 the husband filed a fresh petition for dissolution on the ground of desertion :—*Held*, affirming *A'Beckett, J. (ante, p. 683)*, that no new desertion had occurred. BELTON v. BELTON 977

— Costs of wife—Neglect of husband to pay into Court 942
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— Costs of wife—Payment into Court—Neglect of husband to pay into Court—Practice 940
See PRACTICE DIVORCE. 5.

— Divorce proceedings—Application to appeal in *forma pauperis*—Practice—Full Court 719
See PRACTICE DIVORCE. 2.

— Joinder of claims—Previous action—Non-joinder of personal claims by husband in previous action—Costs 929
See PRACTICE. 32.

— Money due on mortgage—Constructive payment—Settlement 821
See LIMITATION OF ACTION.

IDLE AND DISORDERLY PERSON—Charge of having insufficient lawful means of support—Other offences—Evidence of—Inadmissibility of 574
See POLICE OFFENCES. 2.

IMPLIED COVENANTS—*Transfer of Land Act 1890*—Trustee advancing money to save trust property—Right to indemnity 460
See TRUSTEE. 4.

IMPOSITION TO OBTAIN MONEY—Fraudulent representation—Rogues and vagabonds 151
See POLICE OFFENCES.

IMPRISONMENT OF FRAUDULENT DEBTORS ACT 1890—(No. 1100), ss. 22, 25, *Schedule IV.*—*Debtor's summons—Neglect of debtor to appear—Evidence—Obtaining credit by fraud.*] Where on the return of a debtor's summons the defendant does not appear, and the hearing is adjourned to a date of which the defendant has notice, and the defendant does not appear at the adjourned hearing, an order may be made against him in his absence. Where a purchaser of goods undertook to pay for them on delivery, but having obtained delivery by a fraudulent stratagem without payment, promised payment on a future date, and on that date gave a valueless cheque:—*Held*, upon a summons under sec. 22 of the *Imprisonment of Fraudulent Debtors Act 1890*, that the justices were entitled to find from these facts that the defendant obtained credit by means of fraud. *REGINA v. SCHULTZ, EX PARTE AH LING* 932

INCOME TAX—*Income Tax Act 1895* (No. 1374), s. 27—*Jurisdiction of County Court to state case—Income Tax Act 1896* (No. 1467), s. 16—*Stock and share broker—Membership of Stock Exchange, fee for—Deduction.*] The County Court has jurisdiction under sec. 27 of the *Income Tax Act 1895* (No. 1374), to state a case for the opinion of the Supreme Court, notwithstanding the repeal of sec. 26 of Act No. 1374 by sec. 16 of the *Income Tax Act 1896* (No. 1467). A taxpayer being a stock and share broker is entitled to deduct from his gross

INCOME TAX—continued.

income the amount paid by him in order that he might become a member of the Stock Exchange, where he carried on his business. *IN RE INCOME TAX ACTS* 887

INFANT—*Maintenance—Administration—Share—Corpus—Moneys already expended—Order—Attendance by counsel—Certificate—Costs.*] Moneys already expended by an administrator in the maintenance of the infant children of the intestate may be repaid the administrator out of the infants' shares in the estate. *IN RE SYMONS* 664

— Action by next friend of—Staying action—Forfeiture clause in will—Breach of trust 859
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IN FORMA PAUPERIS—Divorce—Application for leave to appeal in *forma pauperis*—Full Court 719
See PRACTICE DIVORCE. 2.

INFORMALITIES—Amendment of—Order nisi to review—Power of Court 410
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INFORMANT—No interest in penalty—Local authority—Not authorized to prosecute 216
See DOG ACT 1890.

INJUNCTION—*Interlocutory—Landlord and tenant—Recovery of possession—Petty sessions—Reserved decision.*] An injunction to restrain proceedings before justices in petty sessions for the recovery by a landlord of possession will not be granted where the hearing before the justices has been concluded but the decision has not been given. *MITCHELL v. SPONG* 685

INSOLVENCY—*Act of Insolvency—The Insolvency Act 1890* (No. 1102), s. 37 (viii).—*False return of sheriff—Judgment debt, failure to satisfy—Power of Court to go behind judgment.*] The respondent, upon being called to satisfy a judgment debt, said that he would not pay the same, but told the sheriff's officer that he had land at Benambra which he could levy upon. This land was not in respondent's name, and the sheriff's officer made a return that the respondent had no real or personal estate of which he could cause to be made the money required by the writ or any part thereof. An order nisi was obtained to sequestrate the respondent's estate, upon the ground that he had failed to satisfy the judgment debt and that the writ of *fi. fa.* had been returned wholly unsatisfied:—*Held*, that the return was false and that the act of insolvency had therefore not been established. The Court will not, except upon a case of fraud or collusion between the petitioning creditor and debtor, go behind the judgment of the Supreme Court upon which the alleged debt is founded. *IN RE RYLAH, EX PARTE THE COLONIAL BANK OF AUSTRALASIA LIMITED* 844

INSOLVENCY—continued

2. — *Certificate of discharge—Death of insolvent—Jurisdiction—Insolvency Act 1890 (No. 1102), ss. 130, 133, 9—Insolvency Act 1897 (No. 1513), s. 95.* The Court of Insolvency has no jurisdiction to hear an application for a certificate of discharge where the insolvent has died, notwithstanding that the application for such certificate was begun during the insolvent's lifetime. IN RE JAMES - 559

3. — *Insolvency Act 1897 (No. 1513), s. 113—Sequestration of estate of deceased person—Estate unable to pay its debts—Act of insolvency—Insufficiency of materials for order nisi—Objections, right to take.* The estate of a deceased person may be sequestrated by a petitioning creditor upon the allegation that the estate is insufficient to pay its debts, and upon proof of such allegation under the provisions of sec. 113 of Act No. 1513. In the affidavit filed in support of a petition the defendant alleged that according to his information and belief the estate was unable to pay its debts, but did not state any grounds for such information and belief. The order nisi contained the statement by the Judge that "it has been proved to my satisfaction that the estate is unable to pay its debts." Upon the return day of the order nisi, the party opposing the order applied for and obtained an adjournment, and then upon the hearing of the adjourned application took the objection that the order was granted on insufficient materials, no ground of defendant's belief and information being stated:—*Held*, that the materials upon which the order nisi was granted were not open to such an objection under such circumstances:—*Seemle*, the rules made under the *Insolvency Act* (No. 1513) by the Judges of the County Court are not applicable to proceedings in the Supreme Court. IN RE FERGIE - 416

4. — *Petition to sequester—Improper motive—Abuse of process of Court.* Where an act is legal and the intention with which that act is done is to accomplish an object also legal, it is immaterial what the ulterior motive of the party may be. P., who had a personal grudge against M., bought a debt owing by M. to a third person with the view of making M. insolvent and thereby depriving M., who was a municipal councillor, of his seat as councillor. After the purchase of the debt, demand for payment having been made and not complied with, P. took proceedings to sequester the estate of M. Upon the return of the order nisi it was objected that the proceedings were an abuse of the process of the Court:—*Held*, that P. was entitled to take such proceedings, and that they were not an abuse of the process of the Court. IN RE MORISSEY, EX PARTE PERKINS - 776

5. — *Stay of proceedings—The Insolvency Act 1897 (No. 1513), s. 108, sub-s. (2)—Staying proceedings under a petition for sequestration.*

INSOLVENCY—continued.

The Court has power under sec. 108, sub-sec. (2), of the *Insolvency Act* 1897 to stay proceedings under a petition pending an appeal bond *file* brought in respect of the judgment which constituted the judgment debt upon which the petition for sequestration is founded. The presentation of a petition for acceptance by the Judge is a proceeding within the above section, and an order may be made staying such acceptance even upon a notice of motion served upon the petitioning creditor prior to the presentation of the petition. UNION BANK OF AUSTRALIA LIMITED v. DEAN (No. 4) - 453

6. — *Supreme Court—Practice—Order nisi—Insolvency Act 1890 (No. 1102), ss. 37 (vi.) and 38—Insolvency Rules of 10th March 1893, r. 187—Forms in Schedule No. 6—Act of insolvency—Debtor's summons—Service "in the prescribed manner"—Neglect to pay, etc., "for the space of fourteen days"—"Within fourteen days"—Omission of statement of failure to secure.* One of the acts of insolvency as alleged in sec. 37, sub-sec. vi., is "that the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due of an amount of not less than 50*l.* and the debtor has for the space of fourteen days succeeding the service of such summons neglected to pay such sum or to secure or compound for the same":—*Held*, that an order nisi which stated that "the act of insolvency committed by him was that he did neglect . . . within fourteen days from the service on him of a debtor's summons . . . to pay the said sum of . . . therein claimed or compound for the same . . ." was sufficient where in another part of the order nisi it was stated that the petitioner's debt was wholly unsecured. IN RE VANDERBILT - 542

INSOLVENCY OF JUDGMENT DEBTOR—
Stay of proceedings—Costs - 939
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INSOLVENCY RULES—Application of to proceedings in Supreme Court - 416
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INSTRUMENTS ACT 1890—(No. 1103), ss. 132, 133—Bills of sale—Debentures of trading company—Registration—Company—Floating charge—Assurance of personal chattels—Fixtures—Mortgages, right of, to fixtures. A trading company issued debentures by which it charged with all payments of principal and interest "all its property whatsoever and wheresoever both present and future;" the charge was to be a floating security, but so that the company should not be at liberty to create any mortgage or charge in priority to the debentures. The principal moneys secured were to become payable if default were made in payment of interest or in case an effective resolution be passed for the winding-up of the company. The company went into liquidation

INSTRUMENTS ACT 1890—continued.

and the debenture holder claimed the proceeds of the sale of certain chattels and fixtures; the liquidator resisted the claim on the ground that the debentures were bills of sale and were void for non-registration under Part VI. of the *Instruments Act* 1890:—*Held* by the Full Court, that the debentures were not void for such non-registration:—*Per* MADDEN, C.J. On the ground that Part VI. of the *Instruments Act* 1890 did not apply to trading companies:—*Per* HOLROYD, J. On the ground that such debentures were not included in sec. 132 of Act No. 1103 as bills of sale. The question of the right of a mortgagee to trade fixtures discussed. **THE BANK OF VICTORIA LIMITED v. LANGLANDS FOUNDRY COMPANY LIMITED** 280

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— Leave to appear and defend—Setting aside leave 327
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INSUFFICIENT LAWFUL MEANS OF SUPPORT—Idle and disorderly person—Evidence—Admissibility—Other offences 574
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INSURANCE—Fire policy—Condition—Waiver—Assignment—Mortgagee—Absolute beneficial interest—Notice—Extent of local agent's authority—Operation of law—Registration—Claim—Rejection—Authority of manager—Delegation—Power of attorney—Agent—District agent.] The district agent of an insurance company during the currency of a fire policy issued to him by the company on a building and on the furniture therein as mortgagee, sold and transferred all his interest in the mortgage, and on the same date indorsed on the policy a memorandum of transfer of his interest in the policy to the purchaser, from whom he asked and received the full amount of the premium. No notice of the transfer was given by the transferee directly to the head office of the company. The property comprised in the policy was, subsequently to the transfer, but during the currency of the policy, destroyed by fire. Condition 10 of the policy ran—"This policy ceases to be in force as to any property hereby insured the absolute beneficial ownership in which shall pass from the insured to any other person otherwise than by will or operation of law unless notice thereof be given to the company and the subsistence of the insurance in favour of such other person be declared by a memorandum indorsed hereon by or on behalf of the company":—*Held*, that this was not an assignment by operation of law and the transferor had under this condition an absolute beneficial interest in the property insured, which interest he purported expressly to assign to the plaintiff, and that the notice necessary to be given under the condition was a notice to the manager of

INSURANCE—continued.

the company, and that the memorandum indorsed on the policy was insufficient to bind the company as a notice or as a memorandum under the condition. Condition 13 of a fire policy provided, *inter alia*:—"If the claim be not made within three months after the fire or if made and rejected an action or suit be not commenced within three months after such rejection all benefit under this policy is forfeited. A claim was made within three months after the fire, but the acting manager of the insurance company refused "to entertain" the claim. No action was instituted until more than three months after this refusal. The company was incorporated by Royal Charter and constituted under the provisions of certain English Acts of Parliament which authorized the appointment of a manager but gave no power to such manager to appoint a substitute. The manager in Victoria purported to appoint a substitute during his absence:—*Held*, that a refusal to entertain a claim amounted to a rejection, and that the acting manager had power to reject. **WILLIAMSON v. CALEDONIAN INSURANCE COMPANY** 600

INSURANCE MONEYS—Destruction by fire of premises after will—Buildings devised with land—Ademption . . . 522
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INTEREST—Excessive rate of—Bonus on loan—Delay by mortgagor 297
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— Mortgage—Interest, claim for since date of winding-up 662
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— Payment of—Constructive payment—Husband and wife living in amity—Settlement—Money due on mortgage . . 821
See LIMITATION OF ACTION.

INTERPLEADER—Practice—Insolvency of judgment debtor—Costs—"Rules of Supreme Court 1884"—Order LVII., r. 15—Order LXVII., r. 11—Insolvency Act 1890 (No. 1102), s. 76.] Where proceedings upon an interpleader summons are stayed by virtue of the judgment debtor's insolvency no order as to costs will be made on the return of the summons. **HINTZE v. HINTZE; RUHE, CLAIMANT** . . 939

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INVESTMENT OF TRUST FUNDS—Breach of trust—Limitation of action—Fixed deposit in bank—*Trusts Act 1896* 643
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JUDGMENT DEBT—Failure to satisfy—Power of Court to go behind judgment—Act of insolvency . . . 844
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— *Mines Act 1890, s. 366*—Negligence—Action by representative—Jury not indispensable . . . 206
See **WRONGS ACT. 1890**.

JUSTICES OF THE PEACE—*Estoppel—Res adjudicata—Dismissal by justices—Certificate—Justices Act 1890 (No. 1105), s. 77 (17).]* *Semble*, per HOLROYD, J. A certificate of dismissal of an information or complaint issued under sec. 77 (17) of the *Justices Act 1890* is not a bar to subsequent proceedings in respect of the same subject matter and between the same parties when the first case was not heard upon its merits. *LOFT v. WADE (No. 1)*. 214

2. — *Jurisdiction of—Local Government Act 1890 (No. 1112), s. 429—Interference with creek—Mining on creek—Mining under Crown lease—Question of title—Ouster of jurisdiction of court of petty sessions.* Defendant was informed against under sec. 429 of the *Local Government Act 1890* for unlawfully interfering with a certain creek, which had been permanently reserved for public purposes, without the consent of the shire council. The defendant's interference consisted in conducting mining operations on the creek as the holder of a mining lease from the Crown of land comprising the creek. On complaint by information before the court of petty sessions the magistrate held that no question of title was involved, and that he had jurisdiction to hear the case, and he fined the defendant:—*Held*, that a complicated and difficult question of title was involved, and the jurisdiction of the magistrate was therefore ousted. *Reg. v. Mayor, etc., of Walhalla (4*

JUSTICES OF THE PEACE—continued.

V.L.R. (L.) 470 explained and distinguished. *HAUGHTON v. HOCKINGS* . . . 907

3. — *Order in petty sessions—Conviction—Reserved decision—Justices Act 1890, s. 77 (14).]* An order of justices in petty sessions convicting a defendant is not bad by reason of the fact that at the time the justices heard the evidence they had reserved their decision in another case involving the same subject matter. *Hamilton v. Walker ([1892] 2 Q.B. 25)* distinguished. *FORBES v. NEWBOULD* . . . 176

4. — *Practice—Criminal law—Larceny—Justices—Summary jurisdiction—Evidence—Admission of guilt—Rehearing—Crimes Act 1890 (No. 1079), ss. 69, 474.]* The power given to justices by sec. 69 of the *Crimes Act 1890* to deal summarily with certain cases of larceny may not be exercised until evidence in support of the prosecution has been called. *ROGERSON v. GREAVES* . . . 445

— Authority of Minister of the Crown to prosecute—Amendment of authority
See **FACTORIES AND SHOPS**. 3. [785]

— Admission of evidence by—Subsequent rejection by justice—Practice . . . 725
See **LICENSING**. 2.

— Informant—Local authority—Jurisdiction . . . 216
See **Dog Act 1890**.

— *Justices Act 1890—Rules—Rule 18* . . . 667
See **POLICE OFFENCES**. 3.

— *Justices Acts*—"Important question or principle of law"—Meaning of . . . 634,
See **ORDER TO REVIEW**. [792]

— Trial, mode of—Trial of three persons charged on separate informations together—Practice . . . 667
See **POLICE OFFENCES**. 3.

LAND ACT 1890—(No. 1106), s. 127—*Proclamation forbidding cutting timber on Crown lands—Mining lease—Lands held under mining lease—Powers of cutting timber given by lease.]* By sec. 127 of the *Land Act 1890* power is given to the Governor in Council to forbid by proclamation the cutting of timber under certain dimensions from Crown lands although a person may be duly licensed or otherwise authorized so to do. Land held by a lessee under a mining lease from the Crown is Crown land within the meaning of such a proclamation:—*Semble*, the powers conferred by such mining lease are not nullified by the terms of such a proclamation. Where a clause in a mining lease giving power to cut timber for mining operations and for domestic purposes is followed by a clause forbidding the cutting of timber of less than certain specified dimensions, the former clause is limited by the effect of the latter clause. *BROCKLEBANK v. RYAN* . . . 24

LAND TAX—*Act 1890 (No. 1107), ss. 3, 4, 13, 14, 34*—“*Landed estate*,” meaning of—*Valuation—Classification—Government Gazette, evidence of valuation, effect of*—“*Sufficient evidence*,” meaning of.] By sec. 34 of the *Land Tax Act 1890* it is provided that a copy of the *Government Gazette*, containing the valuation for Victoria, and of the *Land Tax Register* “shall be sufficient evidence for all purposes of such valuation and such register”:—*Held*, that the *Government Gazette* is not conclusive evidence of such valuation. The defendant was the owner of land in different parcels of sufficient area to constitute a “*landed estate*” under the *Land Tax Act 1890*; those parcels of land had been valued as parts of different landed estates, but they had never been valued as *one landed estate* in the possession of the defendant or anyone else:—*Held*, that until such parcels of land had been valued as *one landed estate* the defendant was not liable for the land tax in respect of the same. *THE QUEEN v. GIDNEY* . . . 795

LANDLORD AND TENANT—*Lease—Covenant*—“*Charge*” upon demised premises—*Sewerage—Melbourne and Metropolitan Board of Works Acts—1890 (No. 1197), Part III., ss. 114, 116; 1897 (No. 1491), ss. 5, 6.*] Defendants were tenants of premises under a lease whereby they covenanted to “bear pay satisfy and discharge all taxes rates charges and assessments whatsoever whether municipal parliamentary parochial or otherwise imposed or to be imposed upon the said demised premises or any part thereof or upon the landlord or tenant in respect of the occupation thereof.” By sec. 6 of *Act No. 1491* the costs and expenses of having the premises connected with the sewerage system were, until paid, made a charge upon the property in respect of which they were incurred:—*Held*, that these costs and expenses were payable by the defendants under the covenant. *Hartley v. Hudson* (4 C.P.D. 367) followed. *EMMERSON v. SMITH* . . . 491

— *Recovery of possession—Petty sessions—Reserved decision* . . . 685
See *INJUNCTION*.

LEGACY TO EXECUTOR—*Gift annexed to office—Presumption—Rebuttal of presumption—Parol evidence* . . . 626
See *WILL*. 12.

LEGACIES—*Payment of out of real estate—Insufficient personalty* . . . 626
See *WILL*. 12.

LEGAL PERSONAL REPRESENTATIVE—*Appointment of—Death before commencement of suit* . . . 448
See *PRACTICE*. 4.

LEGAL PROFESSION ACT 1891—*Counsel’s fee—“Substantial attendance”—Settlement of action* . . . 757
See *COSTS*. 3.

LEGAL PROFESSION ACT 1891—*continued.*

— *Firm of solicitors—Instructions by partner—Counsel—Certificate* . . . 942
See *PRACTICE DIVORCE*. 6.

LICENSING—*Licensing Act 1890 (No. 1111), s. 121—Permitting thief to be on licensed premises—Receiver of stolen property.*] By sec. 121 of the *Licensing Act 1890* a licensed victualler is liable to a penalty for permitting a thief to be in or upon his premises. A person who had been convicted of three offences of receiving stolen property knowing it to be stolen was permitted by a licensed victualler to be on his licensed premises. The licensed victualler was proceeded against and convicted under sec. 121 for permitting a reputed thief to be on his premises:—*Held*, that the conviction was bad, on the ground that a receiver of stolen property is not a thief within the meaning of the section. The effect of sec. 121 discussed. *M’GAN v. PRATLEY* . . . 840

2. — *Licensing Act 1890 (No. 1111), s. 182—Selling liquor without a license—Evidence, admissibility of—Written statement of witness—Evidence of prior convictions—Order nisi to review.*] A witness signed a written statement of the evidence he was prepared to give in a prosecution; when called, he gave evidence altogether inconsistent with such statement, and was treated as a hostile witness. The written statement was produced, and the witness admitted he had signed it, and said that it was true. The written statement was put in evidence:—*Held*, that the admission by the witness that the statement was true amounted to a repetition of the contents of the statement, and that it was for the magistrates to say which version they believed. A defendant was charged under sec. 182 of the *Licensing Act 1890* with a first offence under that Act. After the close of the case for the defendant the bench announced that the charge was proved, and the informant then proceeded to give evidence of other convictions under sec. 182. Objection was taken to the admission of such evidence, but it was admitted. Upon an order nisi to review the conviction upon the ground of evidence being improperly admitted, the magistrate filed an affidavit stating that although the evidence was at first admitted he subsequently announced that he would reject such evidence, and that he punished the defendant as for a first offence only:—*Held*, that the magistrate was justified in such course, and that the evidence must be taken to have been rejected from the consideration of the case. *SAINSBURY v. ALLSOPP* . . . 725

3. — *Licensing Act 1890 (No. 1111), s. 123—Selling liquor or permitting liquor to be drunk on licensed premises otherwise than during licensed hours—Lodger.*] By sec. 123 of *Act No. 1111* it is an offence “if any liquor is sold or disposed of to or suffered or permitted to be drunk on or from any licensed premises by any person

LICENSING—continued.

whatsoever otherwise than during the hours authorized by the license." A constable entering licensed premises after the hours during which a sale of liquor was authorized by the license found a person who was lodging at such premises purchasing and being supplied with drinks in the bar parlour, together with some other persons whom he had invited to drink with him. The drinks were supplied in the ordinary way by the barmaid, though the licensee had retired and knew nothing about the transaction:—*Held*, the fact of the person who was supplied with liquor being a lodger did not prevent the application of the provisions of sec. 128, and that an offence against the Act had been committed, and that there was evidence to show that such sale of liquor had been "permitted" by the licensee. *CRAMPTON v. STARR* 537

4. — *Licensing Act 1890 (No. 1111), s. 102—Transfer of license—Power of attorney to apply for transfer—Right of licensee to object to application.*] A licensee by an irrevocable continuing authority appointed L. as her attorney under power to apply on her behalf for a transfer of license. L. applied under such authority in the name of the licensee and on her behalf to the Licensing Court for a transfer. The licensee, appearing by counsel, objected to such application, stating that she did not wish the transfer made. The licensee also applied for a transfer to another person. No personal objections were raised to the proposed transferee of L.:—*Held*, that the Licensing Court had a right to look into the terms of the authority given by the power of attorney, and that the fact of the licensee appearing and objecting did not oust the jurisdiction of the Court to grant a transfer in accordance with the terms of the authority given by the licensee. *IN RE LOBB* 622

5. — *Sittings of Court—Licensing Act 1890 (No. 1111), s. 85—Annual sittings of Licensing Court—Extension of time for holding sittings of Court.*] By section 85 of the *Licensing Act 1890* the Licensing Court for each licensing district is to hold an annual sitting in the month of December in every year, and it provides that "the Governor in Council may by an Order in Council extend the time for the holding of such Court by a period not exceeding two months from the thirty-first day of December":—*Held*, that the Governor in Council has only power to extend the time for holding the Court where such extension is made before the sitting of the Court is closed. Where the Court has met and disposed of its pending business, the time for holding the Court cannot afterwards be extended. *IN RE LOGAN* 782

LIEN—Banker's lien—Security—Waiver of lien.] In February 1892, G. gave the Dominion Banking Corporation a promissory note, due in August 1892, which the corporation indorsed

LIEN—continued.

to J. J. discounted the note with the City of Melbourne Bank, he indorsing the note to that bank. The note fell due and was dishonoured, and the bank sued G. and obtained judgment, but received no satisfaction in respect of the note. In 1894 the City of Melbourne Bank wrote to J. asking him to sign a letter requesting the bank to place the amount of the note to the debit of his then overdrawn current account with the bank, and further asking him to sign a cheque for the amount. J. complied with both requests, and the amount of the note was accordingly debited to his account. J.'s overdrawn account was secured. Before this took place the City of Melbourne Bank, together with another bank, in 1894 agreed with J. not to call for or require payment of the moneys owing which might accrue due for a period of five years from the date of the agreement. The bank was to have the right of selling at any time before the expiration of five years any security it might hold. The Dominion Banking Corporation went into liquidation, and the liquidator of the City of Melbourne Bank, which had also gone into liquidation, sought to prove in the winding-up of the corporation in respect of the amount of this note, asserting that it had a lien in respect thereof:—*Held*, that under these circumstances the City of Melbourne Bank had waived its lien, and was not entitled to prove in respect of the note. *IN RE THE DOMINION BANKING AND INVESTMENT CORPORATION LIMITED* 532

LIFE POLICIES—Value of—Stamp duty—Deed of settlement or gift 596
See STAMPS. 2.

LIMITATION OF ACTION—Money due upon mortgage—Settlement—Husband and wife—Constructive payment—Cause of action—Supreme Court Act 1890 (No. 1142), s. 83.] In 1866, by an ante-nuptial settlement, certain moneys were settled upon trust to pay the income thereof to the wife of the settlor during her life, and after her death to hold the same for the issue of the marriage. The moneys so settled were, in September 1871, advanced by the trustees to the settlor upon mortgage. The mortgage contained a covenant for repayment of the money advanced, and interest, on 30th March 1872; but there was a proviso that if the interest was punctually paid to the mortgagees the latter would not call in the principal sum until September 1882. There was no evidence that any interest was paid. The settlor and his wife lived amicably together from the date of the settlement until her death in 1892:—*Held*, that this latter fact did not give rise to an inference of payment of interest, and did not amount to constructive payment, and that therefore the *Statute of Limitations* began to run on 30th March 1872. *IN RE HAWES* (62 L.J. Ch. 463) distinguished. *IN RE SHARP, RUSSELL v. SHARP* 821

LIMITATION OF ACTION—continued.

2. — *Negligence—Death of injured person—Action by representative—“Act complained of”*—*Railways Act 1890 (No. 1135), s. 119—Wrongs Act 1890 (No. 1160), s. 16.*] Sec. 119 of the *Railways Act 1890* applies to actions brought against the Victorian Railways Commissioner by the representative of a deceased person for injury to such person, causing his death. Sec. 119 of the *Railways Act 1890* does not repeal by implication sec. 16 of the *Wrongs Act 1890* with respect to the time within which such an action must be commenced; but both sections will be given effect to, so that such an action must be commenced within six months from the death of the injured person. The words in sec. 119—“act complained of”—may refer to two different classes of events—(1) to the mere injury of the person himself; and (2) to the injured person's death. *POLA v. THE VICTORIAN RAILWAYS COMMISSIONER* 180

— *Breach of trust—Fixed deposit in bank—Time when cause of action first accrued* See *TRUSTEE* 3. [643]

LIMITATIONS, STATUTE OF—Trusts Act 1896 (No. 1421)—Breach of trust—Investment of trust funds—Acquiescence of cestui que trust—Infant 258 See *TRUSTEE* 2.

LOCAL GOVERNMENT—Closed roads—Mandamus—Shire council—Discretion of Judge—Power to disobey—Meeting of council—Ordinary business—Notice of meeting—“Owner”—*Local Government Act 1890 (No. 1112), ss. 9, 10, 175, 176, 178, 180, 428—Vermin Destruction Act 1890 (No. 1153), ss. 58, 59—Procedure—Rule—Direction—Service—Council.*] The lessee of a sheep run obtained from a shire council at one of its ordinary meetings permission under the *Vermin Destruction Act 1890* to erect gates across certain roads adjoining his leasehold within the shire. The notice calling the meeting did not set forth that the business was to be brought before the council. All the councillors were present at the meeting. Upon a rule nisi for a *mandamus* to compel the opening of these roads by the shire council:—*Held*, that as the council might at any time lawfully grant the permission the irregularity, if any, in the method of calling the meeting did not justify the Court in making absolute the rule. On the hearing of an application to make absolute a rule nisi for a *mandamus* of this kind both the landowner and lessee are entitled to be heard. A rule nisi for a *mandamus* to compel the opening of an obstructed road was directed to a municipal council:—*Held*, that the rule was properly directed. Service of such a rule upon the municipal clerk is sufficient. IN *RE THE COUNCIL OF THE SHIRE OF EAST LODDON, EX PARTE CHEYNE* 703

2. — *Closed roads—Local Government Act 1890 (No. 1112), s. 428—Vermin Destruction Act 1890 (No. 1153), Part II.,*

LOCAL GOVERNMENT—continued.

ss. 57, 58, and 59 — *Mandamus—Swing gates—Special area under Vermin Destruction Act—Permission of council to erect obstructions to roads.*] Permission given by a shire council under sec. 58 of the *Vermin Destruction Act 1890 (No. 1153)* to an owner of land within the shire (such land not being within a “special area” under Part II. of the Act) to enclose at his own expense his land, which is intersected with roads, with a continuous wire-netted fence having swing gates covered with wire netting when enclosing any road, is no answer to an application under sec. 428 of the *Local Government Act 1890 (No. 1112)* for a *mandamus* to open and keep open for public use and free from obstruction the roads across which such swing gates are erected. *RE CHEYNE AND THE SHIRE OF EAST LODDON* 900

3. — *Local Government Act 1890 (No. 1112), ss. 523, 524, 534—Prosecuting officer of municipality—Liability of council for cost of proceedings taken by prosecuting officer—Mandamus.*] B., a police officer, who had been appointed by the president of a municipality to represent the council in all proceedings in courts of petty sessions, proceeded against D. for breach of one of the by-laws of the municipality. D. was fined, and then obtained an order nisi to review, which was made absolute, no one appearing to show cause. The order directed the costs of the order nisi to be paid by B. to D. By one of the by-laws of the municipality the police officer appointed by the council was authorized and instructed to enforce compliance with the provisions of the by-laws. B. refused to pay the costs, and D. proceeded by way of *mandamus* to compel the municipality to pay the same:—*Held*, that under the by-laws “enforcing compliance with the provisions” of the same did not authorize the police officer to take legal proceedings, and that no *mandamus* would lie compelling the municipality to pay to the defendant the costs of proceedings incurred by an officer appointed under sec. 523 of the *Local Government Act 1890*. *DUTTON v. SHIRE OF WALHALLA* 910

4. — *Rates and Rating—Local Government Act 1890 (No. 1112), ss. 49, 257; 1891 (No. 1243), s. 15—Municipal councillor—Qualification—“Liable to be rated.”*] An owner of rateable property which is in the occupation of a tenant is not a person liable to be rated in respect of the property within the meaning of sec. 15 of the *Local Government Act 1891*. *Re Joseph Pethybridge (A.R. 5th April 1869)* followed. *THE QUEEN (EX RELATIONE BURKE) v. O'DAY* 60

5. — *Rates and rating—Local Government Act 1890 (No. 1112), ss. 179, 272, 277, 288—Rates, recovery of—Resolution for striking rate—Signing rate book—Appeal against rate—Invalidity of rate, right to take objection as to—Local Government Act 1891 (No. 1243), s. 76—Special rate.*] A resolution confirming a special rate

LOCAL GOVERNMENT—continued.

was passed in 1893; the rate book was not signed until 1898 by three councillors according to the provisions of sec. 272 of the *Local Government Act 1890*:—*Held*, that the signing by such councillors after the lapse of such a period did not invalidate the rate and did not make the rate retrospective:—*Semble*, a rate is made when the resolution therefor is passed. By sec. 288 of the *Local Government Act 1890* it is provided that "upon any complaint or suit for the recovery of any rate from any person the invalidity or badness of the rate as a whole or in respect to any part thereof shall not avail to prevent such recovery":—*Held*, that this provision covers any objection to the validity of the rate, no matter how or when such alleged invalidity appears. *OAKLEIGH, MAYOR, ETC., v. V. GRAY* 380

6. — *Rates and rating—Justices Act 1890* (No. 1105), s. 81—*Particulars of claim, sufficiency of—Local Government Act 1890* (No. 1112)—*Rates, claim for—Particulars of rate.*] In a complaint for the recovery of municipal rates the particulars annexed to the summons should state the date in respect of which the rate has been made. *VIOLET TOWN, SHIRE OF, ETC. v. TWAMLEY* 510

— Interference with creek—Mining on creek —Ouster of jurisdiction—Question of title 907
See JUSTICES OF THE PEACE. 2.

LODGER IN LICENSED HOUSE—Selling liquor on licensed premises otherwise than during licensed hours—Offence
See LICENSING. 3. [537]

LORD'S DAY ACT—*Merchant Shipping Act* (Imperial) 1894, 57 & 58 Vict., c. 60, s. 225, sub-s. 1 (b)—29 Car. II., c. 7, s. 1—*Sunday labour—Seamen and firemen—Vessel in port—Lawful command, wilful disobedience of—Mens rea—Honest belief as to unlawfulness of command.*] Seamen and firemen are not included in the words "tradesman artificer workman labourer or other person" in the statute 29 Car. II., c. 7. Accordingly an order given to a seaman or fireman on a vessel in port to do work on a Sunday is a lawful command. The maxim "*Actus non facit reum nisi mens sit rea*" applies to excuse a defendant from an act which would otherwise be unlawful only where the belief on which the defendant acts is a belief as to facts and not as to law. *R. v. Mollison* (2 V.L.R. (L.) 144) explained. *MARSHALL v. FOSTER* 155

LOSS OF ORDER—Original order lost—Second order 62
See PRACTICE. 20.

LUNACY—*Lunatic domiciled abroad—Lunacy Act 1890* (No. 1113), ss. 129, 130—*Foreign commission—Master in Lunacy—Committee—"Management"—Costs.*] The Court may,

LUNACY—continued.

under sec. 130 of the *Lunacy Act 1890*, when giving "orders in respect of the management" of a lunatic's estate, direct the Victorian committee to realize the personal estate, and to remit the proceeds to the committee of the lunatic's residence and domicile. There is no jurisdiction to provide for the costs of an application under sec. 130 of the *Lunacy Act 1890* out of the lunatic's estate. *IN RE DICKSON* 818

2. — *Lunacy Act 1890* (No. 1113), ss. 134, 213 — *Lunatic—Maintenance—Notice.*] In applications under sec. 134 of the *Lunacy Act* for an order that the property of an alleged lunatic be applied towards that person's maintenance, notice of the intended application should be served upon the alleged lunatic. *IN RE PROUT* 428

— Lunatic executor—Executor becoming lunatic before grant—Administration *c.t.a. durante animi vitio*—Master in Lunacy 753
See PRACTICE PROBATE. 2.

MACHINERY SITE—Miner's right—Lapse—Pegging out—Title—Registration 742
See MINES ACT 1890. 3.

MAINTENANCE OF INFANT—Administration—Money already expended—Infant's share in estate 664
See INFANT.

MAINTENANCE OF LUNATIC—Property of lunatic—Notice of application to lunatic 428
See LUNACY. 2.

MAINTENANCE ORDER—Putative father proceeded against under different statutes—Recognition of child 486
See BASTARDY.

MANDAMUS—*Rates and rating—Justices Act 1890* (No. 1105), s. 139—*Local Government Act 1890* (No. 1112), Part X., Division 7 (ss. 276-287)—*Local Government Act 1891* (No. 1243), ss. 60, 61—*Appeals against rates—Jurisdiction of County Court—Statement of case by Judge of County Court for determination by Supreme Court.*] Notwithstanding the concluding words of sec. 60 of the *Local Government Act 1891* (No. 1243) a Judge of the County Court on the hearing of an appeal against the rating of an "undertaking" under Division 7 (2) of the *Local Government Act 1890* (No. 1112), as amended by the *Local Government Act 1891* (No. 1243) can be compelled by *mandamus* to state the facts specially for the opinion of the Supreme Court by virtue of the provisions of the 139th section of the *Justices Act 1890*. *Russell v. Shire of Leigh* (5 V.L.R. (L.) 199) explained. *MELBOURNE TRAMWAY AND OMNIBUS COMPANY LIMITED v. THE MAYOR, ETC., OF MELBOURNE.* 33

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- Closed roads—*Vermin Destruction Act 1890*
 —Construction of 900
 See LOCAL GOVERNMENT. 2.
- Shire council—Closed roads—Ordinary business—Notice of meeting—Extraordinary business—*Vermin Destruction Act 1890* 708
 See LOCAL GOVERNMENT.

MARINE ACT 1890 (No. 1165), ss. 181, 183, 184, 185—*Court of Marine Inquiry, investigation by—Constitution of Court—Skilled members, list of—Master of steamship, charge against—Misconduct—Gross act of misconduct—Jurisdiction, consent to—Charges against two persons heard together—Certificate, suspension of—Prohibition.*]
 The Court of Marine Inquiry, in investigating a charge against a certificated master of a steamship, must be constituted by one or more police magistrates and two skilled members, such skilled members to be certificated masters of steamships; where, therefore, in investigating a charge against a certificated master of a steamship the Court included an exempt master or pilot, such Court is wrongly constituted. The Court of Marine Inquiry, in investigating a charge against a captain of a steamship for misconduct, has no power to order his certificate to be suspended unless it finds him guilty of a gross act of misconduct. The Marine Board has no jurisdiction to direct the Court of Marine Inquiry to investigate at one and the same time charges against a certificated master of a steamship and against a pilot, being the persons in charge of the respective vessels that came into collision. Where such charges are heard together, the consent of the parties that they should be so heard cannot give jurisdiction. IN RE FORBES, EX PARTE THE MARINE BOARD OF VICTORIA 124

2. — (No. 1165), s. 183 (2)—*Master—Misconduct—Gross act of misconduct.*] The Court of Marine Inquiry, upon investigation of a charge against a master of a steamship of misconduct under sec. 183 (2) of the *Marine Act 1890*, has no power to order his certificate to be suspended unless it finds him guilty of a gross act of misconduct, and this should be specified in the finding of the Court. Order of MADDEN, C.J. (*ante*, p. 124), affirmed. IN RE FORBES AND THE MARINE BOARD OF VICTORIA 502

3. — (No. 1165), s. 151—*Excessive number of passengers on steamship—Liability of master of ship.*] A defendant was charged under sec. 151 of the *Marine Act 1890* for that he being the master in charge of the steamship *Courier* did receive on board of the said steamship a certain number of passengers greater than the number allowed by the certificate issued in respect of such steamship. The defendant was registered as master of the steamship and was in charge of the steamship for the purpose of navigating the same on the occasion men-

MARINE ACT 1890—continued.

tioned in the charge. The defendant had no power or authority from the owner to receive passengers, that being the duty of the marine superintendent of the owners of the vessel, who was on board at the time complained of. The defendant swore that he did not know that more than the proper number of passengers was on board, and on being directed by the marine superintendent he gave directions for the steamship to leave the moorings:—*Held*, that it was the duty of the defendant to have ascertained that the number of persons on board did not exceed the number allowed by the certificate, and that he was liable to a penalty under sec. 151 of the *Marine Act 1890*. DEARY v. MOORE 779

MARRIAGE—Action for breach of promise of
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MARRIAGE ACT 1890—Costs of wife—
 Neglect of husband to pay into Court
 —Practice 940
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MASTER AND SERVANT—Employment at
 lower rate of wages than log rate—
 Intention to evade Act 1
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MASTER OF STEAMSHIP—Charge against
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 firmation of alteration in by Court—
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— Purveyor of milk—Registration of—By-
 law—Place of registration 787
 See HEALTH. 2.

MINES ACT 1890 (No. 1120), s. 32—Cancellation of registration of residence area—Jurisdiction of warden to hear application—Registration of land exempted from mining purposes—Right of private individual to intervene.] The warden has no jurisdiction under sec. 32 of the *Mines Act 1890* to entertain an application by the holder of a miner's right to have the registration of a residence area cancelled on the ground that the land is excepted or withheld from mining purposes by an Order in Council. The Crown is the only party who can take steps for the cancellation of such registration. *HANTON v. FORBES* 21

2. — (No. 1120), s. 49 — *Mining leases—Application for lease on behalf of company—Holder of miner's right—Rights of Crown lessees—Right to test validity of lease.]* W., instructed by the legal manager of a mining company, sent in an application for a mining lease; the application form was signed by W., but the name of the company was set out in the form. The lease was issued to the company:—*Held*, that W. was the agent of the company to make the application on its behalf, and that the lease was rightly issued to the company. The holder of a miner's right is not entitled by virtue of such right to register his claim over Crown lands held under a mining lease, notwithstanding the fact that such lease may be void or voidable as between the Crown and the lessee; nor can such holder of a miner's right test the validity of such lease in a summons for possession before a warden. *COCK v. THE STAWELL AMALGAMATED SCOTCHMAN'S AND CROSS REEFS QUARTZ MINING COMPANY NO LIABILITY* 165

3. — *Miner's right—Lapse—Machinery site—Title—Registration—Mines Act 1890 (No. 1120)—Special case—Procedure.]* In an application on summons before a warden to have it declared that the defendant had forfeited his machinery area, general evidence as to pegging off in 1870 uncontradicted by any evidence as to its irregularity held sufficient evidence of pegging off in accordance with the by-laws. An omission by the holder of a machinery site to take out a fresh miner's right on or before the expiration of the immediately preceding one does not absolutely invalidate the registration of the machinery site, provided that at the time such holding is attacked the holder of the site is also the holder of a miner's right, and it is not necessary in such a case in order to validate his title to the site for the holder subsequently to mark out and register the site on a fresh application. *VIAL v. ALLENDER* (23 V.L.R. 516) and *Abraham v. Della Ca* (23 V.L.R. 338) discussed. The Court will not on a special case stated by a goldfields warden decide questions in the case which are not raised by the facts. *TRUSWELL v. WOODS* 742

4. — (No. 1120), ss. 351, 357—*Regulation and inspection of mines—Ventilation—Level—Working places in a mine—Mine-owner, liability*

MINES ACT 1890—continued.

of—Mine.] By sec. 351 of the *Mines Act 1890* the word "mine" includes a level wherein or whereby is or shall be or has been carried on any operation for or in connection with the purpose of obtaining any metal or mineral. By sec. 357 it is provided—"The following general rules shall so far as may be reasonably practical" ("practicable") "be observed in every mine:—1. An adequate amount of ventilation shall be constantly produced in every mine to such an extent that the shafts winzes sumps levels underground stables and working places of such mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein":—*Held*, that there is an obligation upon every mine-owner to ventilate the level of an alluvial mine unless such level has been distinctly and clearly abandoned, and that the temporary suspension of work in a portion of a level does not cause such portion to cease to be a working place in a mine. It is a question for the jury to decide whether the mine-owner has taken all steps reasonably practicable to produce an adequate amount of ventilation. *COWIE v. THE BERRY CONSOLS EXTENDED GOLD MINING COMPANY NO LIABILITY* (No. 3) 319

— Miner—Death caused by negligence—Action by representative 206
See WRONGS ACT 1890.

MINES ACT 1897—(No. 1514), s. 140—Procedure—Trial in Supreme Court—Injury—Accident in mine—Costs of application.] The onus of proof that an action for injury by reason of an accident in a mine should be tried in the Supreme Court is on the person applying, and it lies upon him to show that it is probable that difficult points of law will occur. *GUYMER v. SOUTH GERMAN REEF GOLD MINING COMPANY NO LIABILITY* 681

2. — (No. 1514), s. 168, sub-ss. 2, 4—*Priority of miners' wages—Distribution of assets of no-liability company—Cessation of work of no-liability company—Wages first charge on property of company.]* By sec. 168, sub-sec. (2) of Act No. 1514 it is provided—"In the distribution of the assets of any mining company under Part I. of the *Companies Act 1890* or company under Part II. of the said Act which is being wound up or in the distribution of assets on the cessation of work of a no-liability company registered under Part II. of the said Act there shall be paid in priority to all other debts of whatsoever kind secured or unsecured all wages not exceeding £50 of any workman who either before or after the commencement of this Act has entered into any contract in respect of services rendered to the company during two months before the commencement of the winding-up or the cessation of work. . . .":—*Held*, that "the distribution of assets on the cessation of work" applies only to a distribution of the assets by

MINES ACT 1897—continued.

the company on the cessation of work, and did not apply to the case of the sale of the machinery of the company by the sheriff at the instance of an execution creditor, and the workmen were not entitled to claim the proceeds of the sale as against the execution creditor. By sec. 169, sub-sec. 4, the wages of workmen are to be a first charge upon all the property of the company:—*See*, that the purchaser of the machinery of the company at the sheriff's sale buys subject to the prior charge of the workmen over such machinery in respect of their wages. IN *RE* THE GLENMONA GOLD MINING COMPANY NO LIABILITY

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MINER'S RIGHT—Holder of—Cancellation of residence area—Jurisdiction of warden
—Rights of the Crown 21
See MINES ACT 1890.

— Holder of—Right to test validity of Crown lease 165
See MINES ACT 1890. 2.

— Lapse—Machinery site—Title—Pegging out—Registration 742
See MINES ACT 1890. 3.

MINING COMPANY—Action by Shareholder
— Forfeiture of shares — Subsequent redemption 677
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MINING LEASE—Construction of—Powers of cutting timber in lease—Proclamation forbidding cutting timber on Crown lands 24
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MINISTER OF THE CROWN—Proceedings against offenders — Direction by Minister — Amendment of Minister's authority 785
See FACTORIES AND SHOPS. 3.

MORTGAGE—Unconscionable bargain—Excessive rate of interest—Bonus on loan—Delay on part of mortgagor—*Mortgage*.] The plaintiff, a married woman, the wife of a carpenter, executed a deed in July 1886, to which her husband and one Marks were parties. By this deed she acknowledged that she had received £200, borrowed from Marks, and secured its repayment by an assignment of all her estate and interest under the will of her late father and any other property to which she might be entitled in expectancy, reversion, or otherwise. The mortgage also secured a bonus of 100*l.* and interest at 20*l.* per cent. per annum on the sum borrowed and the bonus, and there was a provision that the deed should be a security for any further sums which Marks might advance, with interest at

MORTGAGE—continued.

the same rate. Interest was to be compounded if not paid at the period provided. The plaintiff had no solicitor acting for her or other independent advice. Her husband took the money, which was paid over on the execution of the mortgage. Afterwards the husband of the plaintiff applied from time to time for further loans, sometimes getting money and sometimes goods, the price of the latter being charged for as an advance. The husband and Marks procured the plaintiff's signature to acknowledgments, treating these further sums as advances under the deed. In June 1897 a sum of 936*l.* became receivable in respect of the plaintiff's share in her father's estate, and in May 1898 the plaintiff brought an action seeking to have the mortgage set aside, undertaking to repay the sums actually advanced, with interest at 5*l.* per cent. :—*Held*, that this constituted an unconscionable bargain, and that the plaintiff was entitled to be relieved therefrom upon repaying the amount advanced, with interest at 6*l.* per cent. :—*Held also*, following *James v. Kerr* (40 Ch. D., p. 460), that the charge of a bonus was illegal, and should be disallowed. The rule of law that an excessive rate of interest will be reduced to a reasonable rate in cases of the sale of reversionary interests is applicable to cases of mortgages of such interests, though the mere fact in such latter cases that the rate of interest is excessive would not enable the person who agreed to pay it to come to the Court and successfully ask to have the rate reduced :—*Held further*, that the delay in taking proceedings did not bar the plaintiff, inasmuch as confirmation or acquiescence will not be presumed in cases where the reversioner continues in the same situation under the same circumstances which induced her to enter into the oppressive contract. *MALONEY v. THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED* 297

— Money due on—Settlement—Husband and wife—Constructive payment 821
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MORTGAGEE IN POSSESSION—Pipe in highway—Obligation to repair—Leak in pipe—Duty of owner 268
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MORTGAGOR AND MORTGAGEE—*Practice*—“*Rules of Supreme Court 1884*”—Order XV., r. 1—Accounts and inquiries—Order for foreclosure.] In an action by a mortgagee claiming accounts and foreclosure the plaintiff may obtain under Order XV., r. 1, an order for an account, with all necessary inquiries, and the usual directions as in an order *nisi* for foreclosure. *DALGETY AND CO. LIMITED v. BROWN* [161]

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NEGLIGENCE—Accident in mine—Trial in Supreme Court—Difficult points of law involved—*Mines Act 1897*, s. 140—Procedure . . . 681
See MINES ACT 1897.

— Action for—Onus of proof—Nonsuit—Evidence . . . 657
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— Death of injured person—*Railways Act 1890*—“Act complained of”—*Wrongs Act 1890* . . . 180
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— Death of miner—*Mines Act 1890*, s. 366—Trial by jury . . . 206
See WRONGS ACT 1890.

— Ventilation of mines—Working place in mine—Level . . . 319
See MINES ACT 1890. 4.

NEW TRIAL—Practice—Verdict of jury—Contradictory evidence—Documentary evidence—Procedure—“Rules of Supreme Court”—Order XXXIX., rr. 1, 4—New trial motion—Appeal—Notice.] A new trial motion is not liable to dismissal by reason of the fact that the notice of motion is headed “Notice of Appeal” and is a ten-days’ notice, and asks also for an order that the judgment be set aside and a verdict and judgment be entered for the defendant. In determining whether a new trial should be ordered on the ground that the verdict of the jury was against the weight of evidence, the test seems to be whether the verdict is such a one as, in the opinion of the Court, a jury might reasonably find upon the evidence before it. The fact that the evidence is contradictory, and that there is evidence on both sides, is not a *conclusive* reason why a new trial should not be granted. Where the evidence is contradictory, but that of the defendant is clearly supported by the documents, whilst that of the plaintiff is not so supported, the Court may, on a motion for a new trial by way of appeal under Order XXXIX., rr. 1, 4, order the verdict in plaintiff’s favour to be set aside and a new trial, but will not order a verdict to be entered for the defendant. *SCOWN v. HAWORTH* . . . 313

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— Fresh evidence—Discovery of . . . 694
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— Trial by jury—Onus of proof—Action for negligence . . . 657
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NOTICE OF INTENTION TO PROCEED—Appointment of receiver—No proceeding for one year—Notice . . . 308
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NUISANCE—Negligence—*Water service pipe in highway*—*Leak*—*Injury*—*Obligation to repair*—*Mortgagee in possession*—*Water Act 1890* (No. 1156), Part V., Division I.—*Melbourne and Metropolitan Board of Works Act 1890* (No. 1197), Part II.] The owner or occupier of premises to which a water service pipe is laid under the provisions of the *Water Act 1890*, Part V., Division I., is not in the absence of negligence on his part liable in damages for injuries sustained by a person lawfully using the highway, such injuries being due to the dangerous condition of the highway through a leakage from the service pipe. No duty is cast upon the owner or occupier in such a case to see that the public are warned of the danger arising from an escape into the highway of water from the service pipe, even though he has had notice of the escape, provided that the escape has occurred without negligence on the part of the owner or occupier. There is no obligation cast upon him to repair the highway in such a case. A mortgagee in possession of premises has towards the public the same duty as an owner or occupier has. *Fletcher v. Rylands* (L.R. 1 Ex. 278; 3 H.L. 330) discussed. *RAYNER v. THE AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY LIMITED* . . . 268

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See HEALTH. 3.

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OPPRESSIVE CONTRACT—Relief from—Excessive rate of interest—Bonus on loan—Unconscionable bargain . . . 297
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See PRIVY COUNCIL. [736]

ORDER TO REVIEW—"Important question or principle of law"—*Justices Acts 1890* (No. 1105), s. 141; 1898 (No. 1584), s. 2.] The words in sec. 2 of the *Justices Act 1898*, "important question or principle of law," mean some undecided public question of law or point of importance upon which authorities differ.
BEVAN v. MOORE 634

2. — "Important question or principle of law"—*Action by known agent—Justices Acts 1890* (No. 1105), s. 141; 1898 (No. 1584), s. 2.] Where justices in petty sessions decide that a complainant being a known agent may sue for a debt due to his principal such a decision is one which involves an important question or principle of law within the meaning of sec. 2 of the *Justices Act 1898*. Decision of HOOD, J. (*ante*, p. 634) disapproved. *Smyth v. The Queen* ([1898] A.C. 782) applied. **BEVAN v. MOORE** (No. 2) 792

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— Evidence—Finding of jury at former trial—Admissibility of in defence at subsequent trial 636
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PLEADING—*Embarrassment—Contract, verbal or written—Particulars—"Rules of the Supreme Court 1884"—Order XIX*, r. 4—*App. C*, s. 5, l.] A pleading in the form indicated by the rules is good even though in alleging a contract it fails to set forth whether the contract was verbal or written. Particulars of these facts will however be ordered to be given.
O'DAY v. REID AND COMPANY LIMITED 67

— Default in—Several defendants—Separate causes of action—Motion for judgment
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— Defence arising after close of pleadings—Amendment—Leave to plead 937
See PRACTICE. 24.

— Embarrassment—Striking out pleadings for—Questions of law 405
See PRACTICE. 25.

POLICE OFFENCES ACT 1890 (No. 1126), s. 41 (iii).—*Police Offences Act 1891* (No. 1231), s. 12—*Rogues and vagabonds—Imposing upon persons with a view to obtaining money—Fraudulent representation.*] The defendant as the agent for the proprietor of a newspaper took delivery of the papers for sale at three farthings per paper, the arrangement being that he was to be allowed three farthings per paper for all papers returned by him which had been so delivered to him the previous week, and which were unsold. The defendant bought papers at so much per hundredweight from other persons and included such papers in his return to the proprietor as being papers delivered to him during the previous week and which had been unsold, and obtained the allowance of three farthings for the same. An information was laid against the defendant under sec 41 (iii.) of the *Police Offences Act 1890*, charging him with

POLICE OFFENCES ACT 1890—continued.

imposing upon a person by fraudulent representation with a view to obtaining money. He was convicted by the justices:—*Held*, that under the circumstances the conviction could not be sustained. Sec. 41 (iii.) refers to an offence of obtaining money or any other benefit or advantage by imposition, in return for nothing, and not to a contract, though procured by misrepresentation, under which something is to be given in return. *PROSSER v. FOX* . . . 151

2. — s. 40 (1); 1891 (No. 1241), s. 11—*Evidence—Admissibility—Insufficient lawful means of support—Other offences.*] Upon the hearing of a charge under sec. 40 (1) of the *Police Offences Act 1890*, that “the defendant was a person having insufficient lawful means of support, and was therefore deemed to be an idle and disorderly person in accordance with” the Act, evidence will not be permitted to show that the defendant had been guilty of larceny or had been the associate of thieves, or was himself an idle and disorderly person. *WHITNEY v. WILSON* . . . 574

3. — (No. 1126), s. 41, sub-s. 12—*Justices Act 1890 (No. 1105), r. 18—Suspected person—Frequent—Place of public resort—Railway station—Practice—Evidence—Admission—Separate information—Trial.*] Three persons against whom separate informations were laid in respect of the same offence were tried together and convicted. The evidence against each defendant was the same. There was nothing to show that any injustice was done:—*Held*, following *Regina v. Sturt, ex parte Ah Tack* (2 V.L.R. (L.) 103), that the court of petty sessions was not acting illegally in trying the prisoners together. Hearsay evidence of a felony may be admissible in order to show that an accused was a suspected person. That a railway station is a place of public resort within the meaning of sec. 41, sub-sec. 12, of the *Police Offences Act 1890* may be a matter of evidence. Moving about a place and again and again attempting to commit a felony constitutes “frequenting” within the meaning of the sub-section. *DAVIDSON v. DARLINGTON. TAYLOR v. THOMPSON. BRITT v. ELLIS* . . . 667

— *Loitering—Obstruction of carriage way by—Flower-seller* . . . 529
See BY-LAW.

POLICE REGULATION ACT 1890 — (No. 1127), s. 58—*Disputed property in possession of police—Application as to ownership of property.*] When a police constable under and by virtue of a valid search warrant has seized goods in the possession of a person charged in an information with having stolen such goods, he may, after the trial and acquittal of the person so charged, apply under sec. 58 of Act No. 1127 for an order as to the title in the property seized. *Coghill v. Warrell* (16 V.L.R. 238) distinguished. *KELLEHER v. HEFFERNAN* . . . 915

POWER OF APPOINTMENT—Interest of settlor in land—Charge on interest in lands, effect of . . .
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— Will not referring to power—Exercise of power—Appointment of fund . . . 353
See WILL. 13.

POWER OF ATTORNEY—Transfer of license—Power of attorney to apply for transfer—Right of licensee to object to transfer . . . 622
See LICENSING. 4.

PRACTICE—*Admission of barrister and solicitor—Supreme Court—Student at law*—“*Rules of Supreme Court 15th October 1887*,” rr. 7, 8; 1892, r. 22.] A student at law without permission of the Board of Examiners previously obtained left Victoria. On an application by the student for leave to apply for such permission:—*Held*, that rule 22 of the Rules of 1892 did not apply, and that therefore the application could not be entertained. *IN RE HORSFALL* . . . 48

2. — *Affidavit—Commissioner—Deponent's solicitor—Instruments Act 1896 (No. 1423), s. 7.*] The affidavit required by sec. 7 of the *Instruments Act 1896* was sworn before plaintiff's solicitor as commissioner. Defendant gave no notice of defence, but at the hearing objected to the affidavit. The Court of Petty Sessions then heard evidence, and made an order in complainant's favour:—*Held*, that the affidavit was irregular:—*Held also*, that the order, being based upon the evidence taken in Court and not upon the affidavit in question, was good. *GILL v. RYAN* . . . 442

3. — *Appeal—Single Judge—Question of fact—Rehearing by Full Court—Judicature Act 1883, 47 Vict. (No. 761).*] Where a party appeals from a decision of a Judge sitting without a jury upon a question of fact as to which there was contradictory *videlicet* evidence it is the duty of the appellant to satisfy the Court of Appeal that the decision of the Judge was wrong. The effect of the passing of the *Judicature Act 1883* upon this principle discussed. If the party applying for a new trial has had a reasonable opportunity to adduce certain evidence at the trial and has not done so, the Court will not grant a new trial on the ground of the discovery of fresh evidence. The decision in *Ward v. Hearne* (10 V.L.R. (L.) 163) applied. *HEALEY v. BANK OF NEW SOUTH WALES (No. 2)* . . . 694

4. — *Appointment of representative*—“*Rules of the Supreme Court 1884*”—*Order XVI., r. 46—Legal personal representative, appointment of.*] Under Order XVI., r. 46, the Court has power to appoint a person representing the estate of a deceased person although such deceased person died before the commencement of the suit. *Silver v. Stein* (1 Dr. 296) not followed. *PATRIOK v. MUMBY* . . . 448

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5. — *Costs—Taxation of costs—County Court appeal—Rehearing—Scale of costs—Discretion of taxing master—Counsel's fee—Partner—Certificate of Associate—Amendment.*] Where a County Court action is by order of the Full Court reheard before a Judge of the Supreme Court, and the Judge awards costs, but fixes no scale, the Prothonotary in taxing the costs has a discretion which he must exercise as to whether the Supreme Court or the County Court scale shall be applied. *Mansfield v. Mansfield* (17 V.L.R. 228) explained. In taxing the costs of such an action the Prothonotary may refuse to allow a fee for "instructions for brief," but may allow a fee to counsel, or, alternatively, for drawing proofs, even although no claim for such a fee was made in the bill, and although a "practitioner's" fee had been allowed to counsel's partner. A Judge will not, on a review of taxation, allow the certificate of the Judge's Associate as to the result of the trial to be rectified. *CURNOW v. PIKE* - 190

6. — *Costs—Taxation of costs—Party and party—Unsuccessful appeal—Judge's notes—Copy order of dismissal—Third copy.*] Where an appeal from a single Judge to the Full Court is dismissed with costs the respondent may include in his bill of costs, as between party and party, the costs of obtaining for himself a copy of the Judge's notes and of obtaining a third copy of the order of dismissal. *ESSENDON LAND AND FINANCE ASSOCIATION LIMITED v. KILGOUE* (No. 2) - 546

7. — *Damages—Assessment—Appearance—No defence—"Rules of Supreme Court 1884"—Order XXVII., r. 4—Order XXXVI., r. 11—Order XIII., r. 5.*] Where in an action for damages for breach of promise of marriage the defendant entered an appearance, but did not file a defence:—*Held*, that under Order XXXVI., r. 11, the defendant is entitled to notice of the assessment of damages. *KING v. RING* - 400

8. — *Default in pleading—"Rules of the Supreme Court 1884"—Order XXVII., rr. 11, 12—Motion for judgment on default of pleading—Several defendants.*] The plaintiff brought an action against A., an executor, asking for accounts upon the footing of wilful default; B. was subsequently joined as a defendant interested in the residue of the estate. B. delivered a defence to the action, but A. was in default, not having delivered any defence. The plaintiff thereupon applied by way of motion to have judgment entered against A., under Order XXVII., r. 11. B. was not made a party to the proceedings:—*Seem*, that the provisions of Order XXVII., r. 11, were not applicable to a case where there were several defendants, and the provisions of Order XXVII., r. 12, were only applicable where the cause of action was severable:—*Held further*, that there was no separate severable cause of action, and

PRACTICE—continued.

that the motion should be dismissed. *LITTLE v. LITTLE* - 203

9. — *Discovery—Order—Non-compliance—Dismissal of action—Delay—"Rules of Supreme Court 1884"—Order XXXI., rr. 12, 21.*] Where an *ex parte* order for discovery has been obtained the other party has the right in any subsequent proceeding to object that such order was made on insufficient grounds or was unnecessary. *CORSAIR CONSOLIDATED GOLD MINES LIMITED v. GRAY* - 829

10. — *Discovery—Security for costs—Deposit—Discretion—"Rules of Supreme Court 1884"—Order XXXI., rr. 25, 26.*] Order XXXI., r. 25, gives a Judge discretion to dispense with the security for costs of discovery. This discretion will be exercised where the only property of the plaintiff is in defendant's hands as trustee thereof. *HINTZE v. HINTZE* - 485

11. — *Discovery in aid of execution—Defendant—"Party entitled"—"Rules of Supreme Court 1884"—Order XLII., r. 32—Costs.*] A defendant in whose favour a judgment for costs has been entered is a "party entitled" within the meaning of Order XLII., r. 32. It is not necessary, upon an application under this rule, to show that the applicant has made an attempt to obtain satisfaction of his judgment. *ZWICKER v. KRONHEIMER* - 424

12. — *Equitable execution—"Rules of Supreme Court 1884"—Order LXIV., r. 13—Proceedings taken after a year—Notice of intention to proceed—Motion for a receiver.*] Judgment in an action was recovered in 1894, but the judgment remained unsatisfied; in 1898 the defendant became entitled to an interest in the estate of his mother, and the plaintiff thereupon applied by way of motion, giving the usual notice, for the appointment of a receiver. An objection was taken that, as no proceedings had been taken in the cause for one year, one month's notice was necessary under Order LXIV., r. 13, before the plaintiff could proceed:—*Held*, that an application for a receiver was not a proceeding in the cause within the meaning of Order LXIV., r. 13. *LONERGAN v. DIXON* (23 V.L.R. 8) distinguished. Judgment having been recovered in an action and the judgment to a large amount remaining unsatisfied, the plaintiff, four years afterwards, having ascertained that the defendant was entitled as one of the sons to a fourth share in his mother's intestate estate, applied by way of motion for the appointment of a receiver. Administration of the estate had not been granted. The plaintiff filed an affidavit stating that there were no other assets on which legal execution could issue, and that the defendant had no means of satisfying the judgment except through his interest in the estate of his mother:—*Held*, that a receiver should be appointed of the

PRACTICE—continued.

interest of the defendant in the estate. **THE BANK OF AUSTRALASIA v. WHITEHEAD** - 308

13. — *Evidence—Company—Corporation—“Rules of Supreme Court 1884”—Order XIV., r. 1.]* A foreign corporation carrying on business in this country must, when applying for final judgment under Order XIV., prove the fact of its incorporation, such fact being a material allegation of the statement of claim. **THE UNION BANK OF AUSTRALIA LIMITED v. LAMBELL** - 509

14. — *Examination de bene esse, application for—Affidavit in support of, sufficiency of—Material witness.]* Upon an application for an order to examine a witness *de bene esse*, the affidavit stated that the witness was “a material and necessary witness for the plaintiff in this action,” and further stated that in the opinion of the solicitor the plaintiff could not safely proceed to trial without his evidence:—*Held*, that the affidavit should state generally what the witness was going to prove, so as to satisfy the Court that he was a material witness, and that it was not sufficient merely to state that he was a material witness. **BLEASBY v. ROMNEY** [201]

15. — *Foreign procedure—Supreme Court—County Court—Jurisdiction—Liquidated demand—Service in Western Australia—Costs—“Rules of Supreme Court 1884”—Order LXV., r. 12—County Court Act 1890 (No. 1078), ss. 61, 64, Part V.—Intercolonial Debts Act 1887.]* In an action for a liquidated demand claiming an amount under 50*l.* a writ for service out of the jurisdiction was served on the defendant in Western Australia, and on the defendant's neglect to appear, judgment was signed against him for default of appearance. An order was obtained for leave to proceed in the action, and that the Prothonotary fix the amount of the judgment. The Prothonotary fixed such amount, but refused to tax costs on the Supreme Court scale:—*Held*, that the provisions of Order LXV., r. 12, applied, and that a Judge had a discretion to allow costs upon the Supreme Court scale:—*Held also*, that the words of sec. 138 of the *County Court Act 1890* refer to process in aid of a judgment or of execution upon a judgment issued out of the local courts of the province and not issued out of Victorian Courts:—*Held also*, per **WILLIAMS** and **HOLROYD, JJ.**, that the plaint summons referred to by sec. 139 of the *County Court Act* for service out of the jurisdiction is one under the provisions of either sec. 61 or sec. 64:—*Sed*, per **HOOD, J.** Such summons should be issued under sec. 61, modified by the requirements of Part V. of the *Act*. **L. STEVENSON AND SONS LIMITED v. HARTLE** - 555

16. — *Foreign procedure—Supreme Court—Liquidated demand—Service in Western Australia—Costs—“Rules of Supreme Court 1884”—Order LXV., r. 12—County Court Act 1890*

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(No. 1078), s. 64, Part V.] Where in an action for a liquidated demand claiming an amount under 50*l.* the writ is served in Western Australia, and on the defendant's neglect to appear leave to proceed is granted and judgment is entered for the amount claimed, costs upon the *Supreme Court* scale will not be allowed. **WILKINSON v. CURRIE** - 65

17. — *Interrogatories—Answering affidavit—Re-swearing—Order—Form—Objection—“Rules of Supreme Court 1884”—Order XXXI., r. 10.]* An answer to an interrogatory was qualified by a condition. The condition was, by order of a Judge in Chambers, struck out:—*Held*, that the answer as altered need not be re-sworn:—*Held also*, that the deponent could not contend that the answer as altered was not his answer. After an order is approved by both parties and signed by the Judge objections to its form will not be entertained. **CAYRON v. RUSSELL** - 69

18. — *Interrogatories—Further and better answers—Payment of deposit—Waiver—“Rules of Supreme Court 1884”—Order XXXI., rr. 11, 25, 26—Order LXIV., r. 7.]* Where a party interrogated delivers his answers he cannot on a summons for further and better answers object that the other party has failed to pay the full sum required as a deposit under Order XXXI., r. 26. **BLACK v. WILSON** - 565

19. — *Interrogatories—“Rules of the Supreme Court 1884”—Order XXXI., r. 1—Leave to deliver further interrogatories—Form of application.]* *Semble*, an application for leave to deliver further interrogatories may be made *ex parte*. **HALL v. NORTH QUEENSLAND INSURANCE SOCIETY** - 720

20. — *Order in Chambers—Originating summons—Loss of order.]* Where the order of a Judge at Chambers has been lost, the same Judge may, upon proof of the loss and of the terms of the original order, allow an order to be drawn up identical in terms with the lost order, but may also at the same time require an order to be drawn up reciting the loss of the original order, that the loss and the terms of the order have been satisfactorily proved, and that a similar order has been allowed. **FOLLETTI v. FOLLETTI** - 62

21. — *Order to review—Evidence—Conflict—Facts—Costs of adjournment—Justices Act 1890 (No. 1105), ss. 146, 148.]* Upon the hearing of an order to review the Court will, where there is a direct conflict of fact, accept the version of the party who supports the magistrates decision. Whether the Court will under any circumstances accept evidence contradicting the magistrates' affidavit, *quære*. **MARTIN v. O'SULLIVAN** - 856

22. — *Order to review—“Person aggrieved”—Informant—Justices Act 1890 (No. 1105), ss. 141, 154—Article of food—Sale—Nature and*

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composition—*Health Act 1890* (No. 1098), ss. 43, 46.] The words "person aggrieved" in sec. 141 of the *Justices Act 1890* include an informant whose information has been dismissed by a court of petty sessions. A sale is effected "to the prejudice of the purchaser" within the meaning of sec. 43 of the *Health Act 1890* (No. 1098), when the purchaser is supplied with an article of food wholly different to the particular article demanded by him. *RIDER v. FREEBODY*. *CANTY v. BRUSSELS*. *CANTY v. MILLER*. *CANTY v. BAKER* 429

23. — *Particulars—Action for breach of promise of marriage—Sexual intercourse—Admission—Alleged unchastity before breach—"Rules of Supreme Court 1884"—Order XIX., r. 7.]* In an action for breach of promise of marriage the plaintiff alleged that relying upon the defendant's promise she permitted him "to debauch and carnally know her and as a result thereof" she was confined of a child. The defendant admitted the promise and intercourse, but alleged that before breach he discovered plaintiff to be unchaste, and that the intercourse occurred on a date which precluded a child from being the result of that intercourse:—*Held*, that the plaintiff should give particulars of the time or times and place or places of the intercourse alleged by her. *DUNN v. SUTHERLAND* 749

24. — *Pleading—Defence arising after pleadings closed—Amendment—"Rules of Supreme Court 1884"—Order XXIV., r. 2—Order XXIII., r. 2—Order XXI., rr. 11, 12, 13.]* A defendant may not after the pleadings in an action have closed deliver a further defence by way of counterclaim without leave of the Court, even although the new matter was pleaded by defendant within eight days of its discovery by him. A defendant in an action for slander, and after the pleadings had closed, delivered, without leave, a "further defence by way of counterclaim," claiming against the plaintiff and a third party for rent and for money lent. Upon summons to strike out this pleading as embarrassing:—*Held*, that such a pleading was embarrassing and should be struck out. *Sander v. Sundercombe* (11 A.L.T. 70) applied. *DALE v. NELSON* 937

25. — *Pleading—"Rules of the Supreme Court 1884"—Order XIX., r. 27—Order XXV., rr. 2, 4—Striking out pleadings tending to embarrass or delay fair trial of action—Questions of law, trial of.]* Upon an application under Order XIX., r. 27, to strike out certain paragraphs of a defence on the ground that they tend to prejudice, embarrass, or delay the fair trial of an action, where such paragraphs raise a debatable point of law the Judge will not decide whether the contention of one side or the other is correct. The proper procedure is to raise the question of law in the reply, and to make an application to have the point of law

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set down for hearing before the trial under Order XXV., r. 2. *HEALEY v. BANK OF NEW SOUTH WALES* 406

26. — *Promissory note—Action—Leave to defend—Setting aside—Instruments Act 1890* (No. 1103), s. 93.] Where a defendant in an action under Part I., Division IV., of the *Instruments Act 1890* has once obtained leave to appear and defend, under sec. 93, by showing facts making it necessary for the plaintiff to prove consideration for the note sued upon, the Court has no jurisdiction to set aside such leave upon a subsequent application by the plaintiff showing facts proving consideration. *THE UNION BANK OF AUSTRALIA LIMITED v. DEAN* (No. 1) 327

27. — *Promissory note—"Rules of the Supreme Court 1884"—Order XIV., r. 1—Final judgment—Instruments Act 1890* (No. 1103), s. 93—*Leave to defend under Instruments Act.]* Plaintiff issued a writ under the *Instruments Act 1890* as the indorsee and holder of two promissory notes made by the defendant. The defendant obtained leave to defend under that Act upon an affidavit satisfying the Judge that there were facts which would make it incumbent upon the holder to prove consideration. An application to set aside such order giving leave to defend was dismissed upon the same ground, viz., that there were facts alleged by defendant which would make it incumbent upon the holder to prove consideration, the Judge refusing upon such application to decide the question of consideration on the affidavits. The plaintiff then applied under Order XIV., r. 1, for leave to sign final judgment, setting out in the affidavits facts proving consideration:—*Held*, that notwithstanding the defendant had obtained leave to defend under the *Instruments Act 1890*, such order was no bar under the circumstances of the case to the plaintiff proceeding under Order XIV., r. 1, for leave to sign final judgment. *Sargood v. Britten* (21 V.L.R. 286) commented on and distinguished. *THE UNION BANK OF AUSTRALIA LIMITED v. DEAN* (No. 2) 331

28. — *Promissory note—Instruments Act 1890* (No. 1103), Part I., Division 4, sec. 93—*Action upon bill of exchange—Summary proceedings—Leave to defend—"Rules of Supreme Court 1884"—Order XIV., r. 1.]* Where a defendant has obtained leave to appear to a writ issued under the provisions of Part I., Division 4, of the *Instruments Act 1890*, and to defend the action, and has entered an appearance, he is entitled to go to trial in the ordinary way, and the procedure under Order XIV. is inapplicable. The words "to defend the action" in sec. 93 of the *Instruments Act 1890* mean to defend the action to the end, according to the ordinary course of proceedings in the Court. *Order of Hood, J., varied. Sargood*

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v. *Brillen* (21 V.L.R. 286) discussed. **UNION BANK OF AUSTRALIA LIMITED v. DEAN** (No. 3) [373]

29. — *Receiver—Service of notice of motion out of jurisdiction.*] The Court has power to grant leave to serve notice of motion for the appointment of a receiver upon the defendant out of the jurisdiction in a case where the judgment in the action had been obtained in this jurisdiction, and the defendant had been personally served with the writ within the jurisdiction, and where the property in respect of which a receivership is sought is also within the jurisdiction. **THE ENGLISH, SCOTTISH AND AUSTRALIAN BANK LIMITED v. HOBAN** - 451

30. — *Reference to Chief Clerk—Evidence—Document executed subsequently*—"Rules of Supreme Court 1884"—*Order LV., r. 67.*] Where the Chief Clerk is directed by an order of the Court to ascertain more fully the interests of certain persons in certain lands evidence will not be allowed before the Chief Clerk of documents of title executed subsequently to the order of the Court. **LONDON BANK OF AUSTRALIA LIMITED v. MURRAY** - 551

31. — *Trial—Application for jury—Declaration of trust—Alternative claim for damages—Discretion*—"Rules of Supreme Court 1884"—*Order XXXVI., rr. 3, 6.*] Where in an action the relief claimed is a declaration of trust in respect of certain property, and a transfer of such property to the plaintiff, or in the alternative damages for breach of agreement, such action does not come within the terms of *Order XXXVI., r. 6*, and a Judge has a discretion to refuse an application for a jury. *Amoretty v. City of Melbourne Bank* (8 A.L.T. 128) distinguished. **BIGGS v. KELLY** - 198

32. — *Trial by jury—Costs—Joinder of claims—Previous action*—"Rules of Supreme Court 1884"—*Order LXV., s. 1.*] The fact that a plaintiff in an unsuccessful action by himself and his wife for damages for injury failed to add his personal claim for damages, and in a subsequent action against the same defendant recovered a substantial amount in respect of that claim, may be a sufficient reason for depriving the plaintiff of the costs of the second action. A. and his wife brought an action against B. for damages in respect of an injury caused by the latter's negligence. The jury gave a verdict for defendant. Subsequently A. brought an action against B. in respect of the same subject matter for injury caused to A. personally. The jury awarded him substantial damages:—*Held*, that A. was entitled to costs, but that the costs of the defendant in the first action should be taxed as between solicitor and client, and should be set off against the costs of the latter action. **NALLY v. WALSH** - 929

PRACTICE—continued.

33. — *Trial by jury—Evidence—Nonsuit—Action for negligence—Onus of proof.*] Where the circumstances adduced in evidence by the plaintiff in an action for negligence are, in the absence of direct proof of negligence, as consistent with the injury being caused by his own negligence as with it being occasioned by the negligent omission of the defendant, the plaintiff fails to satisfy the onus of proof upon him, and should be nonsuited. *Wakelin v. London and S.W. Railway Co.* (12 App. Cas. 41) applied:—*Per Hood, J.* The rule that a railway station must be so lighted that persons lawfully thereupon may be in reasonable safety applies only to such persons, and does not extend to persons outside the premises. **KIRBY v. THE VICTORIAN RAILWAYS COMMISSIONER** [657]

34. — *Trustee and cestui que trust—Supreme Court—Breach of trust—General account—Parties—Principle of equity—Judicature Rules—Co-trustees—Survivor of two trustees—Representatives of deceased trustee—Non-appearance of some defendants—Filing of statements of claim—Setting down action on motion for judgment*—*Order XIII., r. 12—Order XXVII., rr. 11 and 12.*] Where beneficiaries wish to recover in respect of a breach of trust by two or more trustees, the cause of action is severable, and they may bring an action against one or more of them without making the others parties; but if, with the claim in respect of a breach of trust, there is claimed a general account, all the trustees or their representatives are necessary parties. *Coppard v. Allen* (2 De G. J. & S. 173) followed. Where, by a principle of equity, and not a mere variable practice of the Court, a suit used to be regarded as abortive unless certain persons were made parties, the Judicature Rules cannot do away with the necessity of such persons being parties. It is not, under the Judicature Rules, the duty of a defendant who takes an objection for want of parties to take out a summons to have them added; he may take the objection by his defence, argue it at the trial, and if successful is entitled against the plaintiff to costs of and occasioned by an adjournment to add them as parties. Where two executors of a deceased trustee are, with the surviving trustee and certain of the beneficiaries, made defendants to an action for breach of trust and general accounts, and do not enter an appearance, two statements of claim must, under *Order XIII., r. 12*, be filed against them, an affidavit of such filing made, and the action must be set down on motion for judgment against them under *Order XXVII.* **FALKINGHAM v. HARBISON** - 764

35. — *Writ—Service of—Judicature Act 1883 (No. 761), s. 59—British subject residing abroad—Service of writ of summons—Writ for service within jurisdiction—Defendant tempor-*

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arily in England—Attorney-under-power having power to defend actions.] The only power to issue against and serve a writ on a British subject residing out of the jurisdiction of the Court is that given by sec 59 of the *Judicature Act 1883* (No. 761). Under that section there is no power in the Court to order that service of a writ of summons upon the attorney-under-power of a Victorian temporarily residing in London shall be deemed service on his principal, even if his power of attorney enable him to defend actions on behalf of his principal. *PAYNE v. FINK* . . . 471

36. — *Writ—Service upon company—Commercial traveller—Foreign company—"Carrying on business"—"Rules of Supreme Court 1884"—Order IX., r. 8—Companies Act 1896 (No. 1482), s. 70 (3).]* A foreign company is not carrying on its business in Victoria by reason only of the fact that it employs a commercial traveller resident in Victoria to receive orders on commission and to transmit them to its office abroad. *PEARCE v. TOWER MANUFACTURING AND NOVELTY COMPANY* . . . 506

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PRACTICE COUNTY COURT—Action for slander—Separate counts—General verdict.] Where in an action in the County Court for slander several separate and distinct utterances are alleged, upon one of which no evidence is given, it is the duty of the Judge sitting without a jury to make a separate finding of fact upon each allegation. He may not in such a case give a general verdict. *LONG v. MILETT* 194

2. — *Appeal from County Court—Taxation of costs—Security for costs—"Trial"—County Court Act 1890 (No. 1078), ss. 133, 147.]* An order of a County Court Judge reviewing the Registrar's taxation of a bill of costs may be subject to an appeal to the Full Court. Upon such an appeal it is not a necessary condition under sec. 133 of the *County Court Act* that the

PRACTICE COUNTY COURT—continued.

appellant pay into Court or give security for the amount of the bill of costs. Costs relating to interrogatories and notices to produce and to admit and costs relating to the preparation and engrossment of counsel's brief are costs in the action as distinguished from costs of the trial. *NALLY v. WALSH* 41

PRACTICE DIVORCE—Alimony—Order for permanent alimony—Appeal—Evidence—Fresh evidence—Admissibility—"Rules of Supreme Court 1884"—Order LVIII., r. 4—Marriage Act 1890 (No. 1166), ss. 87, 88.] *Per MADDEN, C.J., and WILLIAMS, J. (A'BECKETT, J., dissentiente).* The principle of *Ward v. Hearne* (10 V. L. R. (L.) 163) applies in an application to bring forward fresh evidence on an appeal from the order of a Judge granting permanent alimony:—*Per HODGES, J.* Where an order for alimony *pendente lite* has been made, the assessment will be regarded upon an application subsequently for an order for permanent alimony if the circumstances of the parties have not altered in the meantime:—*Sed per Full Court [MADDEN, C.J., and WILLIAMS and A'BECKETT, J.J.]* The Court will not, in fixing the rate of permanent alimony payable by a husband respondent, consider evidence of expectations, but will be guided entirely by evidence of his present means. *ASHLEY v. ASHLEY* 220

2. — *Appeal—Application for leave to appeal in forma pauperis.]* Application for leave to appeal in *forma pauperis* by a party in divorce proceedings who has not sued or defended in *forma pauperis* in the Court below must be made to the Full Court. *BELTON v. BELTON, EX PARTE BELTON* (No. 2) 719

3. — *Citation—Procedure—Personal service—Substituted service—"Cannot"—Jurisdiction of Court—Divorce Rules 1885, r. 10—Marriage Act 1890 (No. 1166), s. 108.]* The Court has no power under sec. 108 of the *Marriage Act* 1890, and r. 10 of the *Divorce Rules* 1885 to order substituted service of a citation on a respondent who may be personally served. The word "cannot" in r. 10 does not mean inability by reason of want of money. *DEVERIA v. DEVERIA* 827

4. — *Citation—Service of Citation—Mode of proof—Jurisdiction—Marriage Act 1890 (No. 1166), s. 113.]* There is no jurisdiction in Chambers to make an order that the petitioner in a divorce suit be at liberty at the hearing to prove service of the petition and citation by affidavit. *KEANE v. KEANE* 63

5. — *Costs of wife—Payment into Court—Jurisdiction—Marriage Act 1890 (No. 1166), s. 111.]* It is not necessary in order to compel the payment into Court, under sec. 111 of the *Marriage Act* 1890, by a husband of a sum of money not exceeding 20*l.* that a preliminary

PRACTICE DIVORCE—continued.

order for the payment by him of 5*l.* under the section should have been made. Where a husband neglects to pay into Court under the section the sum fixed by the taxing officer, a summons to compel him to do so may be taken out, but this should be done promptly. *Jackson v. Jackson* (2 *Argus* L.R. 224) explained. *ZANONI v. ZANONI* 940

6. — *Costs of wife—Payment into Court—Jurisdiction—Marriage Act 1890 (No. 1166), s. 111—Certificate—Counsel—Partner—"Rules of Supreme Court 1884"—Order LXV., r. 27 (16).*] Although there is jurisdiction under sec. 111 of the *Marriage Act* to make an order for payment into Court by a husband of the sum to be fixed by the taxing officer for his wife's costs, a Judge will not do so until the sum has been fixed and the husband has neglected to pay. A member of a firm of solicitors may be instructed by a partner and may be certified for as counsel. *JOSE v. JOSE* 942

7. — "*Divorce and Matrimonial Rules of 3rd February, 1885,*" rr. 26, 114, and 136—*Respondent out of jurisdiction—Extended time for appearance—Extending time for delivering answer after 21 days fixed by r. 26 expired—Jurisdiction of Court.*] Where the respondent in a divorce suit was residing in Queensland, and the Judge had fixed the time for her appearing as within 30 days after service upon her of the citation and copy of the petition, and the citation called upon her "then and there to make answer to the petition:"—*Held*, that the Court had jurisdiction, even after the 21 days allowed by rule 26 of the "*Divorce and Matrimonial Rules of 3rd February 1885*" for filing her answer had expired, to extend the time for filing the answer, and the Court allowed 28 days' further time for filing the same. *BOUCHAUD v. BOUCHAUD* 519

PRACTICE PROBATE—Document purporting to be will—Absence of attestation clause—Witnesses both dead—Presumption of due execution—Wills Act 1890 (No. 1159), s. 7.] Where a document purporting to be a will and in the handwriting of the person signing it as testator has no attestation clause, but the two persons whose names are subscribed in writing apparently differing from that of the testator and from each other, as witnesses, are dead, such document may be capable of proof as a valid will. *IN RE BUCKLEY* 923

2. — *Lunatic executor—Executor becoming lunatic before grant—Lunatic patient—Master in Lunacy—Administration c.t.a. durante animi vitio—Dispensing with bond and sureties.*] Where an executrix who was practically the sole beneficiary under the will became a lunatic patient before applying for a grant of probate, the Court, without requiring notice to the next of kin of the lunatic patient or to anyone else, granted administration c.t.a. to the Master in

PRACTICE PROBATE—continued.

Lunacy for the use and benefit of the lunatic patient until she became of sound mind, and dispensed both with the usual administration bond and sureties. *IN RE SNELLING* 753

3. — *Order nisi—Evidence—Affidavit—Administration and Probate Act 1890 (No. 1080), sec. 22.]* Where on the return of an order nisi for probate the caveator does not appear the order may be made absolute, subject to an affidavit of service, without *viva voce* evidence being given. *IN RE BUCKLEY* 945

4. — *Regule Generales, 23rd June 1873—Probate—Rule XVI.—Executor's accounts—Attachment for non-filing of accounts—Costs.*] An executrix had neglected to file the fifteen-months account required by the rules. A beneficiary under the will wrote to her solicitors requiring the account to be filed. The request not being complied with, the beneficiary's solicitors prepared materials necessary for the obtaining of an order nisi for attachment, and incurred costs therein. Subsequently the accounts were filed, but the executrix refused to pay the costs of the beneficiary. An order nisi was then obtained calling upon the executrix to show cause why she should not be attached for contempt of court in not having filed the accounts within the time prescribed:—*Held*, that the executrix was in contempt for not having filed the accounts, and that the Court had jurisdiction to enforce the payment by the executrix of the expenses incurred by the beneficiary in procuring the filing of such accounts. *IN RE SMITH* 730

PRIVY COUNCIL—Appeal to—Practice—Procedure—Leave to appeal to Privy Council—Order in Council, 9th June 1860—"Person or persons"—"Value"—"Amount"—Mining property—Security for costs—Form of conditional order.] Two applications are necessary for leave to appeal to the Privy Council under the Order in Council of 9th June 1860. On the initial application the party seeking the order has first of all to satisfy the Court that the judgment sought to be appealed involved either directly or indirectly any claim or demand respecting property of the value of 500*l.* The Court, when so satisfied, grants a conditional order declaring the amount and value of the security to be entered into by the appellant for the prosecution of the appeal and the payment of costs, and directing whether the judgment appealed from be carried into execution or be suspended pending the appeal. If the applicant comply with this order within three months a subsequent application is necessary for a final order that the terms have been complied with and the appeal allowed to be made. The words "person or persons" in the Order in Council include both appellant and respondent where the judgment appealed is not entirely in favour of one party. *CAYRON v. RUSSELL* (No. 2) 735

PRIVY COUNCIL—continued.

2. — *Appeal to—Practice—Security for costs—Supreme Court Act 1890 (No. 1142), s. 231.* By sec. 231 of Act No. 1142 in an application for leave to appeal to the Privy Council the Court shall "require that the person appealing from such decision shall give such sufficient security as aforesaid for payment of all costs previously incurred and to be incurred by reason of such appeal":—*Held*, following *Speight v. Syme* (21 V.L.R. 530) and the former practice of the Court, that the "costs" referred to are the costs of the appeal to the Privy Council, and not the costs of the trial previously incurred. But *quære, per* HOOD, J., whether such decision and such former practice are not in contravention of the terms of sec. 231. *HEALEY v. THE BANK OF NEW SOUTH WALES* (No. 3) 733

— *Appeal to—Order giving leave to appeal—Appeal from order—Jurisdiction* 997
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See *ADMINISTRATION AND PROBATE ACT 1890. 2.*

— *Conveyance to evade the payment of duty—Parties* 12
See *ADMINISTRATION AND PROBATE ACT 1890. 3.*

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PROMISSORY NOTE—*Contemporaneous oral agreement—Inconsistency—Inadmissibility of evidence—Costs.* In an action by the indorsee of a promissory note against the indorser, evidence will not be permitted of a contemporaneous oral agreement between the parties whereby the defendant agreed to indorse the note in plaintiff's favour and the plaintiff agreed not to enforce the defendant's liability upon the note unless and until another fund had been exhausted, and then only for the balance unpaid, such an agreement being inconsistent with the terms of the written contract. Breach by the plaintiff of an oral agreement of this kind does not form ground for a cross action. *Heseltine v. Simmons* ([1892] 2 Q.B. 547) discussed and distinguished. *HESLOR v. PHILLIPS* 498

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SETTLEMENT—Deed of—Power of appointment—Interest of settlor in land—Charge on interest in lands, effect of.] By a marriage settlement, E. W., who was entitled to a share as one of the next of kin in her father's estate, which consisted of real estate, settled all her interest in trustees, who had power to convert the real estate and to invest and hold the proceeds subject to certain trusts. E. W. was to have the income from such fund during her life, with the power of appointment by deed or otherwise. E. W. had executed a power of appointment in favour of her husband in 1887. In 1890 E. W. executed a deed, purporting to charge in favour of the London Bank all her interest in the lands and documents of title referred to in the deed.—The bank brought an action to enforce such charge over E. W.'s interest in the lands:—*Held*, that as the lands had passed to the trustees under the deed of settlement on trust for sale and conversion and investment, and to hold the proceeds thereof subject to the trusts, that the power of appointment contained in such deed did not relate to the lands, but only to the proceeds of the sale of such lands, and E. W. had no title or interest in the lands which the bank could take in such action. *THE LONDON BANK OF AUSTRALIA LIMITED v. MURRAY* (No. 2.) . . . 713

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SOLICITOR—Taxation of costs—*Bill of costs—Withdrawal—Condition.*] A solicitor when delivering his bill of costs to a client is not entitled to withdraw the bill if not paid and to send in a corrected account unless he at the time of delivery of the first bill makes clear to the client that the charges in the delivered bill are not enforceable. *In re Thompson* (30 Ch. D. 441) applied. *IN RE MICHIE* 440

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STAMPS—*Stamp duty—Settlement, deed of—Indenture or disentailing assurance—Stamps Act 1890 (No. 1140), s. 71; 1892 (No. 1274), ss. 24, 25, 28, Schedule Division VIII.]* In determining whether an instrument is taxable as a settlement under Act No. 1274, Schedule Division VIII., the subject matter of the instrument will not be considered, but only the instrument itself. The value of the property settled is merely looked at in order to fix the amount payable in respect of the tax. By a deed of settlement certain properties, the subject of a prior deed of settlement, were disentailed, and new interests created in lieu of the entail and as consideration therefor, but as to the bulk of the property the earlier settlement prevailed:—*Held*, that as the intention of the Legislature was to impose a tax upon such instrument, the tax was payable upon the whole subject matter of the instrument, without regard to the property unaffected thereby. *SPENSLEY v. THE COLLECTOR OF IMPOSTS* . . . 53

2. — *Stamps Act 1892 (No. 1274), s. 25—Stamp Duty—Deed of settlement or gift—Policies of life assurance—Value of.*] Under a deed of settlement, under which the sum of 2,000*l.* was settled, the settlor, after settling certain policies of assurance on his life and other securities upon trustees for his wife, covenanted to increase the property to the value of 2,000*l.* The policies were payable on the death of the party assured, and were assessed by the settlor for the purposes of duty at their surrender value at the date of the deed. The Collector of Imposts charged duty on the settlement by assessing the policies at their full face value. There was no covenant by the settlor to pay the premiums, and the trustees under the deed were expressly indemnified from any obligation as to keeping up the same:—*Held*, that the value of the policies assessable for the payment of duty was the surrender value of the same, and not the full face value, and that the amount available for duty under the above circumstances was the percentage chargeable under Schedule 8 of the Act on the sum of 2,000*l.* which the settlor had covenanted to settle. *IN RE TWOPENNY, EX PARTE THE COLLECTOR OF IMPOSTS* . . . 596

3. — *Transfer on sale—Stamps Act 1890 (No. 1140), s. 96—Stamps Act 1892 (No. 1274), s. 25—Schedule (viii.)—Settlement or gift, deed of—Value of security, mode of calculating.*] L. A. L. transferred certain freehold properties, leasehold properties, and mortgages to her daughter M. L., and the deed declared such lands and property were transferred in consideration that M. L. should expend and apply the sum of 50*l.* per annum during the rest of the natural life of L. A. L. in keeping and maintain-

STAMPS—continued.

ing the said L. A. L. To secure the performance of this agreement the deeds were to remain in the custody and control of L. A. L. There was no evidence to show the age of L. A. L. :—*Held*, that this was not a transfer of property on sale, that the deed was not an instrument upon a pecuniary consideration whereby property is given within Schedule (viii.) of Act No. 1274, and was therefore assessable for duty as a deed of settlement or gift. In arriving at the value of a security the Collector of Imposts must take into consideration the actual value of the security to the person holding the same, and must not assess the duty upon the nominal or face value of the security. *IN RE LANG, EX PARTE THE COLLECTOR OF IMPOSTS* - 807

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— s. 22 - 945

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— No. 1482, ss. 77, 78, 79, 80	613
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TRANSFER OF LAND ACT 1890—(No 1149), ss. 93, 209—*Administration and Probate Act 1890 (No. 1060), s. 6—Administratrix of administratrix, right of to be registered as proprietor.* The administratrix of an administratrix is not entitled to be registered as proprietor of land belonging to the estate of the original intestate. The administratrix of an administratrix claiming to be entitled to be registered as proprietor of land belonging to the original intestate is entitled to proceed under sec. 209 of Act No. 1149, and to call upon the Registrar to substantiate

TRANSFER OF LAND ACT 1890—*continued.* the grounds of his refusal to register. *IN RE O'CONNOR. IN THE MATTER OF THE TRANSFER OF LAND ACT 1890* . . . 896

TRANSFER OF LICENSE—Power of attorney to apply for transfer—Right of licensee to object . . . 622
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TRANSFER OF SHARES—Transfer to man of no means—Sale of shares by bailiff—Refusal to register transferee 808
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TRIAL—*Mode of "Rules of the Supreme Court 1884"—Order XXXVI., r. 6—Trial by jury—Application for jury, when refused.* A jury will be refused in a trial if the costs thereby occasioned are disproportionate to the appropriateness of such a tribunal, or if the case is scientific or abstruse, so that the employment of a jury would cause embarrassment or delay. *COWIE v. BERRY CONSOLS EXTENDED GOLD MINING COMPANY NO LIABILITY (No. 2)* 212

2. — "Rules of the Supreme Court 1884"—*Order XXXVI., r. 3—Right to a jury—Equitable relief, claim to—Alternative claim for damages.* The plaintiff in an action asked for a declaration that the defendants were trustees for him of certain shares, and for a transfer of the shares to him, and in the alternative claimed 50,000% damages:—*Held*, that this was a cause or matter within Order XXXVI., r. 3, as being one heretofore within the cognizance of the Court in its equitable jurisdiction, and that a Judge in Chambers was right in refusing the plaintiff a jury in such an action. *BIGGS v. KELLY* . . . 402

— Mode of—Jury—Negligence—Death of Miner—*Mines Act 1890, s. 366—Action by representative* . . . 206
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— Justices of the peace—Separate informations—Trial of three persons charged together . . . 667
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— Mode of trial—Application for jury—Declaration of trust—Discretion of Judge . . . 198
See PRACTICE. 31.

— Trial in Supreme Court—Accident in mine—Procedure . . . 681
See MINES ACT 1897.

TRUSTEE—*Appointment of—Bias—Trustee company director—Counsel in action.* The fact that one of the directors of a trustee company was counsel for the plaintiff in an action which resulted in the removal of such trustee and the substitution of a trustee company in his place, does not necessarily prevent such company from being chosen as trustee upon the ground of unconscious bias. *WALLACE v. WALLACE (No. 2)* . . . 898

TRUSTEE—continued.

2. — *Trustee—Breach of trust—Trustee company—Power of investment—Security authorized by trust deed—Fixed deposit in bank—Companies Act 1890 (No. 1074), s. 384—Trusts Act 1896 (No. 1421), s. 29 (b)—Statute of Limitations—Covenant—Acquiescence by c.q.t.* Where there is an appointment to and an acceptance of a trusteeship under seal and there is no express covenant by the trustee to do any special act or to perform any duty, no covenant to invest upon any kind of security is to be implied: *Adey v. Arnold* (2 De G. M. & G. 432). This doctrine will be held to apply even where there is a provision in the deed that the trustees shall invest upon particular named securities. No minute differences in the form in which the obligations of the trustee are expressed should be regarded, and unless something upon the face of the deed plainly shows that the trustee's execution thereof was required for some purpose beyond the acceptance of the trust the rule laid down in *Adey v. Arnold* should govern. The lending by trustees of trust money, without fraud, on unauthorized securities is a breach of trust, which falls within sub-sec. (b) of sec. 29 of the *Trusts Act 1896* (No. 1421), and actions in respect of it must be brought by those not under disability within six years after the cause of action accrues. If however one not under disability who is entitled to the income of the trust fund for her life, together with her infant son who is entitled thereto in remainder, brings an action for such a breach of trust after the six years have expired the Court will in the interest of her co-plaintiff order the fund to be replaced, and she will thus gain the benefit of the income which may arise when the replaced fund is invested on authorized security; but, *Seemle*, if she had acquiesced in the unauthorized investments the Court would give to the trustee any difference in income of the investment of the replaced fund over the unauthorized investment. *MATTHEWS v. THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED* 258

3. — *Breach of trust—Trust Act 1896 (No. 1421), s. 29, sub-s. (1), sub-div. (b), and sub-s. 2—Fixed deposit in bank—Reconstruction of bank—Fixed deposit in new bank—Limitation of action—Time when cause of action first accrued.* A trustee company, in breach of its trust, but without fraud, more than six years before the action was brought invested upon deposit receipt for fixed periods trust moneys in a bank which while they remained so invested, in 1892, went into liquidation. In October of that year the trustee company applied for and accepted in full satisfaction and discharge of the liability of the bank in liquidation deposit receipts for fixed periods for similar amounts in a new company formed to purchase the assets of and take over the liabilities of the bank in liquidation:—*Held*, by the Full Court, that the transaction in 1892

TRUSTEE—continued.

was a breach of trust, and being within six years of the action being brought, the remedy therefor was not barred by reason of the *Trusts Act 1896* (No. 1421), sec. 29, sub-sec. (1), sub-div. (b):—*Per* MADDEN, C.J. It was a breach of trust, because it was the plain duty of the company at that time to realize the deposit receipts in the old bank, make up any deficiency out of its own funds, and invest the amount on proper securities:—*Per* HOLROYD, J. It was a breach of trust, because it was in effect a payment off of the old deposits, and an investment of the amount upon the deposit receipts of the new bank. *MATTHEWS v. THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED* 643

4. — *Trustee and c.q.t.—Settlement of mortgaged property—Settlement providing for c.q.t. occupying property—Trustee out of his own moneys paying off mortgage to save trust property—Trustee's right to indemnity—Trustee taking transfer of mortgage—Trustee ejecting c.q.t.—Transfer of Land Act 1890 (No. 1149), ss. 95 and 121—Implied covenants.* If a trustee of mortgaged land under the *Transfer of Land Act 1890* (No. 1149) has, in order to save the estate, paid off the mortgage out of his own moneys he is entitled to be indemnified out of the trust property, and to this end may take a transfer of the mortgage in the name of a nominee, and eject his *cestuis que trustent* from possession of the property, not for the purpose of personally enjoying the property, but to get out of the property the wherewithal to recoup himself the amount he has paid to save the estate; and he may do this although by the terms of the trust he is to permit them to occupy and manage the property, and has covenanted so to do. *DALY v. THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED* 460

5. — *Next friend of infant plaintiff—Staying proceedings until infant 21—Inquiry as to whether action for benefit of infant—Will, construction—Forfeiture clause on bringing action—Trustee and cestui que trust—Breach of trust—Frivolous and vexatious action—Reasonable and bona-fide action—Costs.* A testator by his will devised and bequeathed the residue of his real and personal property to trustees upon trust for sale and conversion, with a discretion to postpone the sale and conversion as long as they should think fit, and let his real estate, and upon trust to invest the proceeds upon Government stocks or debentures or first mortgage of freehold estate and to stand possessed thereof in trust for all the children of his daughter Teresa Wallace who before or after her decease should attain the age of 21 years, in equal shares, and he empowered his trustees to apply the yearly income of any minor's presumptive share towards his maintenance, etc.; and he provided as follows:—“I declare that any and every person and per-

TRUSTEE—continued.

sons entitled to any benefit under this my will whether presumptively or absolutely who shall take any proceedings either at law or in equity against my executors or trustees for the time being or shall institute any suit in any Court of competent jurisdiction for the administration of my estate shall absolutely forfeit all benefit to which he she or they shall be entitled under my will and the same shall belong and be paid to the treasurer of the Melbourne Hospital for the benefit of that institution." An action was brought by an infant son of the testator's daughter by his next friend against his father, who was the sole surviving trustee of the will, and the other children of the testator's said daughter and the Melbourne Hospital, alleging many breaches of trust, and amongst others that the defendant trustee had taken moneys of the trust estate as loans or advances to himself without proper security, that he had expended large sums of the estate moneys in the purchase of mining and bank shares, in lending moneys to individuals without security, that he had placed moneys of the estate upon deposit in banks, and that he claimed as his own and had retained for his own use the income of properties which belonged to the trust estate. On motion by the defendant trustee to stay the action until the plaintiff came of age, or refer it to the Chief Clerk to ascertain whether it was for the infant's benefit to bring the action, having regard to the forfeiture clause, it was shown that the action had been threatened by the adult sons of the testator's daughter, who were defendants; but that, acting under counsel's advice, the action had been, with his consent, brought in his name in order to evade or avoid the forfeiture clause:—*Held* by HOLROYD, J., that the motion should be dismissed, with costs. At the trial counsel for the Melbourne Hospital, a defendant in the action, proposed to cross-examine a witness for the plaintiff to show that the action was really that of the adult sons, that he might raise the question whether they also had forfeited their interests:—*Held* by MADDEN, C.J., that no case between the Melbourne Hospital and the adult sons could be raised in this action:—*But held*, that any of the beneficiaries who were adult were entitled to argue upon the question of the construction of the will as to the forfeiture clause affecting the plaintiff's interest:—*Held*, that though the forfeiture clause might apply to a frivolous or vexatious action brought against the trustee, it did not apply to an action *bonâ fide* and reasonable such as the present. Observations on how far forfeiture clauses in wills can be valid. Where, after the defendant's evidence is closed, a witness is recalled for the plaintiff by permission of the Court and asked a question which the Court disallows as irrelevant, and is not further examined by the plaintiff, he may be cross-examined by the defendant on the case gener-

TRUSTEE—continued.

ally:—*Held*, that the costs arising out of the questions of law raised by the forfeiture clause, as well as the costs of showing that the action was reasonable and *bonâ fide*, being due to the will of the testator, should come out of the estate; that the defendant trustee should pay to the plaintiff the costs of the issues of breach of trust on which he has succeeded, and to the other beneficiaries who were defendants one set of costs. WALLACE *v.* WALLACE . . . 859

— Breach of trust—Parties—Severable cause of action—General account claimed—Parties to suit . . . 764
See PRACTICE. 34.

— Powers of—Management—Station business—Power to buy land . . . 979
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TRUSTEE COMPANY—Administration—Affidavit by manager of search for will—Sufficiency of—Practice . . . 528
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UNCONSCIONABLE BARGAIN—Excessive rate of interest—Bonus on loan . . . 297
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VENTILATION OF MINES—"Level"—Working places—Liability of mine owner . . . 319
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VOLUNTARY WINDING-UP—Winding-up under supervision of Court—Application for compulsory winding-up order . . . 420
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See MINES ACT 1897. 2.

WAIVER OF LIEN—Banker's Lien—Taking security . . . 582
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WARDEN—Jurisdiction of—Application for cancellation of residence area—Minor's right—Holder of . . . 21
See MINES ACT 1890.

WARRANT OF COMMITMENT—Contempt—Question tending to criminate—Witness . . . 957
See CORONER.

WATER ACT 1890—(No. 1156), ss. 120, 458—*Liability for water rates—Necessity for notice—Water supply from standpipe.* Service of notice is a condition precedent to the liability of an owner or occupier to pay water rates under sec. 120 of the *Water Act 1890*, where the water supply is obtainable only from a standpipe. *KORUMBURRA WATERWORKS TRUST v. COLGATE* . . . 951

2. — (No. 1156), s. 4—*Reservation of drain sold on Crown lands—Right of action—Statutory remedy—Easement—Implied grant—Drainage, right to—Easement on Crown lands.* By sec. 4 of the *Water Act 1890* it is provided that "when any Crown land is conveyed and any stream creek race or drain flows through or over the land or the bed or channel of any disused stream race or drain is upon the land so conveyed although no reservation or exemption be contained in the Crown grant no person unless specially authorized by the Minister shall obstruct destroy or interfere therewith under a penalty not exceeding fifty pounds." The plaintiff, the holder of a Crown grant, brought an action against the defendant claiming damages for the obstruction of a drain through his land contrary to the provisions of this section:—*Held*, that the provisions of the section constituted a mere statutory prohibition, and did not give the plaintiff any right of action for loss incurred through the breach thereof. The rule of law that where the owner of two tenements sells them to two different persons at the same time the service which one tenement rendered to the other, if it were continuous and apparent at the time of sale, becomes permanent, and that the owner of the servient tenement cannot deprive the dominant tenement of the advantage theretofore possessed, is applicable to cases where the sale has been made by the Crown. *HOWITT v. FITZGERALD* . . . 387

WATER PIPE—Service pipe in highway—Leak—Obligation to repair—Mortgagee in possession . . . 268
See NUISANCE.

WILL—*Accumulation—Vesting—Rule against perpetuities—Thellusson Act—Wills Act 1890* (No. 1159), s. 35.] A testator by his will directed his trustees to set apart as a distinct fund one-tenth of the income of his estates, and to accumulate this fund until a certain sum was reached, and then to pay the said sum to one of his sons if and when he attained the age of 30 years, and also directed that if the sum was reached before the son became 30 further

WILL—*continued.*

additions to the fund should cease, and the future one-tenth income should fall into the residuary trust estate, and that if this son became 30 years of age before the sum had accumulated to postpone the payment until the sum was reached, the testator's expressed intention being that this son should receive that amount, "and neither more nor less," and that if the son did not live to attain 30 the accumulations should fall into the residue. The son became 31 and died. The accumulations did not reach the sum fixed by the testator:—*Held*, following *Oddie v. Brown* (4 De. G. & J. 179), that the direction to accumulate was not void:—*Held also*, that a trust for the son was created, and that the administrator of his estate was entitled to the accumulations. *MACVEAN v. MACVEAN* . . . 835

2. — *Construction—Absolute discretion—Conversion—Residue.* A testator devised and bequeathed all his real and personal estate to an executor "upon trust to sell call in and convert so much thereof as shall not consist of ready money into money at the absolute discretion of my said executor and out of the proceeds of such sale calling in and conversion and such ready money as aforesaid to pay," etc.:—*Held*, that the words gave the executor a discretion as to the mode and time of conversion, and made a joint-stock of the proceeds of both personalty and realty, so that a subsequent direction as to the disposal of "the rest residue and remainder of my said personal estate" included the whole of the residuary estate of the testator. *IN RE O'DRISCOL. THE NATIONAL TRUSTEES COMPANY v. O'CONNELL* . . . 482

3. — *Construction—Absolute gift—Clause legally and illegally modifying absolute gift—Perpetuity—Maintenance out of income of void gift of corpus.* A testator's will was divided into paragraphs, and by paragraph 7 he declared that his trustees should hold the property "in trust for such of my children . . . as being male shall attain the age of 25 years (but subject as to the share of Thomas Cuthbert O'Brien to the trusts hereinafter declared concerning the same) or being a female shall attain the age of 25 years, or shall before attaining that age marry . . . but subject to the declaration next hereinafter contained . . ." By the next paragraph (8) he directed the income of one share to be paid to Thomas Cuthbert O'Brien for his life or until he should alien or encumber it; remainder to his children. By paragraph 9 he declared that the share of every daughter of his in the property should be held by the trustees upon trust during the life of such daughter to pay the interest thereof to her for her separate use, so that she should not have power to deprive herself of the same by sale, mortgage charge or otherwise by way of anticipation and after the death of such daughter in trust for her children who being sons should attain the age

WILL—continued.

of 25 years or being daughters should attain that age or should before attaining that age marry, and in default of children so attaining 25 or marrying the share of such his daughter should be held upon such trusts and in such manner as his daughter should by deed or will appoint, and in default of appointment the share of such daughter should accrue to the testator's other children and the issue of any then dead. By paragraph 12 he declared that his trustees "shall apply the whole or such part as they shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child . . . and shall during such suspense of absolute vesting accumulate the residue (if any) thereof . . . for the benefit of the person or persons who under the trusts herein contained shall become entitled to the principal fund from which the same respectively shall have proceeded with power for the said trustee or trustees to resort to the accumulation of any preceding year or years and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively":—*Held* that, by the reference to the "trusts hereinafter contained" in reference to Thomas Cuthbert O'Brien's share, the testator must be taken as referring to clause 8 of the will, and by the reference to the "declaration next hereinafter contained" in reference to the daughters' shares he must be regarded as referring to clause 9 of the will:—*Held also*, following *The Trustees Executors and Agency Company Limited v. Jenner* (22 V.L.R. 584) that the gift to the daughters' children who might attain 25 was void for remoteness, and that the whole of the 9th paragraph was inoperative to restrict the gift made to the daughters, who therefore took absolute interests and not for life only:—*But held*, that the 12th paragraph, as to maintenance, was separable from the gift to the daughters' children and not subject to the same defect, and that therefore the absolute interests of the daughters were subject to the provision for the maintenance of their children until each child attained 25 or being female married. *IN RE O'BRIEN. PRYTZ v. TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED* 360

4. — *Construction—Ademption—Insurance moneys—Insured buildings devised with land—Destruction by fire after will—Intention by testator to rebuild.* A testator devised his "freehold land and property situate in etc. . . . formerly known as number" so-and-so to certain individuals. The buildings on this land had been insured by him against fire, and after the making of his will were destroyed by fire. He obtained the insurance money from the Insurance Company, and intended to re-

WILL—continued.

build the premises, but before he had entered into any contract for so doing he died:—*Held*, that the devisees were not entitled to the insurance moneys, nor were the executors bound or justified in expending them in rebuilding. *THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED v. SCOTT* 522

5. — *Construction—Gift to person described as "son" of testator's brother—Extrinsic evidence as to testator's intention.* A testator bequeathed his residuary estate upon trust to pay to his brother the income for the maintenance and education of "his son and daughter who are now living until his youngest child who is now living shall attain the age of twenty-one years," and after that period he directed his trustee to divide his estate into three equal shares between his brother and "his said son and daughter." The brother had a daughter but never had a son. There was, however, a boy aged four who was the illegitimate son of the step-daughter of the brother of the testator. This boy was brought up in the brother's household as one of his family, and might have been supposed to be his son by any acquaintance not informed of the facts as to parentage. The testator visited his brother's house and observed the children, and there was nothing to suggest that he knew anything as to the real parentage of the boy:—*Held*, that the boy was entitled to his share of the legacy under the will. *KINNAIRD v. ALLEN* 609

6. — *Construction—Intestacy—Punctuation.* A testator's will ran thus:—"I give devise and bequeath unto A. H. . . . my house and ground in the Inglewood road St. Arnaud. My furniture and effects to Mrs. A. H. The cash in bank and elsewhere after payment of my just debts funeral and testamentary expenses also a tombstone on my grave":—*Held*, that there was no intestacy:—*Held also* that the testator, by his will, intended all his property to go to the persons named in the will—to the first person named the house and ground, and the rest of the property to the other person. *IN RE GRIERSON* [476

7. — *Construction—Misdescription—Parol evidence.* A testator by his will directed that "the land section 82 in Seymour" should be held in trust for his sister for life, remainder to her issue. He did not own, nor was there in Seymour, any land being section 82, but he did own two pieces of land adjoining one another in Seymour, one of them being 82 acres, the other 31 acres:—*Held*, that parol evidence was admissible to show what land was intended, and, on the evidence, *held* that his sister took a life estate in the 82 acres. *IN RE PURCELL* 478

8. — *Construction—Omission—Uncertainty—Trust—Residue.* A testator's will ran thus:—"After payment of my just debts funeral and testamentary expenses I give devise and be-

WILL—continued.

queath unto my wife. And I hereby appoint the said M. B. executrix of this my will":—*Held*, that the whole of testator's estate after payment of the debts passed to M. B. Evidence to show that the testator intended his widow to take absolutely will not be admitted. *In re Bassett's Estate* (L.R. 14 Eq. 54) approved. *IN RE BYRNE. BYRNE v. BYRNE* - 832

9. — *Construction—Executor—Tenant for life—Remainderman—Furniture—Heirloom—Indemnity—Danger—Intricate will—Conts.*] The Court has no power to order a tenant for life of furniture and other household chattels to provide security, or to indemnify the executor against loss of the furniture and chattels, provided the said furniture and chattels are not in instant danger. *IN RE LAZARUS* - 567

10. — *Construction—Powers of trustees—Power of management—Power to carry on station business—Power to buy land—Implied power to rent land—Implied power to accept surrender of a lease by a tenant—Implied power to mortgage in order to carry on business—Implied power to purchase stock—Solicitor also trustee—Profit costs—Costs of solicitor trustee for acting as solicitor to estate in matters other than actions—Costs of solicitor for himself and co-trustees in defending action.*] Where trustees under a will have power to manage and carry on a station property, they have power to take a lease of contiguous lands, the occupation of which is almost essential to the beneficial management of the station, especially where the will gives them power to buy outright such lands if they think it advantageous to the estate. Trustees of a will who lease a property to a lessee who, while the lease is still subsisting, they think may not be able to pay his rent, cannot be said to act in breach of trust by entering into possession of the property by agreement with the lessee if they have an honest belief that it is for the benefit of the trust, although there may be no express power under the will to make arrangements with lessees or to accept surrenders of leases. A testator who was the owner of a station and the stock upon it, and carried on thereon the occupation of a grazier, died leaving a will which empowered his trustees to carry on the business, and for that purpose to use the capital as well as the income of the estate, pending its realization and the postponed division of his estate. It also gave them power to sell the stock and to let the station:—*Held*, that the power of carrying on the business was not limited to a continuing of the business immediately after his death, but applied at any time when the property might, after having been let, be unoccupied by a tenant, and under such circumstances authorized them to purchase stock to graze upon it, and for the purpose of making such purchase to mortgage the estate. A solicitor who is one of several trustees under a will can act as solicitor to the trustees in defending an action for alleged breach of trust,

WILL—continued.

and can charge for his services and obtain ordinary costs; but he cannot charge against the estate profit costs in matters in which he and his partners have acted generally as solicitors to the estate. *UMPHREY v. GREY* 979

11. — *Executor—Solicitor—Trusts and powers—Charges.*] By his will a testator declared that one of his executors, a solicitor, should, in addition to a commission, be allowed, not only his usual professional charges, but also a proper remuneration for all business done, and all attendances, time, and trouble in and about the execution of the trusts and powers of his will, whether the business was usually within the province of a solicitor or not:—*Held*, that by the words "trusts and powers" the testator meant only those trusts and powers which are expressly declared by his will, whether they would be duties attaching to an executor by virtue of his office or not. *IN RE PFELL; IN RE CRISP, LEWIS AND HEDDERWICK* - 946

12. — *Payment of legacies out of real estate—Pecuniary legacies, insufficiency of personally to satisfy payment of—Administration Act 1890 (No. 1060), s. 8—Act 27 Vic., No. 230—Executor—Legacy to person appointed executor—Gift annexed to office—Rebuttal of presumption—Parol evidence.*] A testatrix by her will "gave and devised" to an adopted daughter the sum of £200, and to a nephew the sum of £50, and in similar words various sums to a series of legatees. The personal estate was insufficient for the payment of these legacies, but the testatrix left real estate, undisposed of by her will, which would have been sufficient to satisfy the same:—*Held*, that the real estate was available for the payment of the legacies. A testatrix by her will gave a legacy in the following words:—"To John O'Sullivan my executor fifty pounds; to his daughter W. my god-daughter fifty pounds;" then followed other legacies, and then the words, "and I hereby appoint John O'Sullivan executor of this my will." O'Sullivan did not prove the will, but authorized a trustee company to apply for and obtain administration with the will annexed. O'Sullivan gave instructions for the funeral, bought land for the grave, and intended, in the first instance, to act as executor, but afterwards nominated the company to act:—*Held*, that assuming the legacy was given to O'Sullivan in his character as executor, he was not entitled to the same under the circumstances:—*Held further*, that evidence was admissible to rebut the presumption that the legacy was given to O'Sullivan in his character as executor. An affidavit was filed deposing that the testatrix had on various occasions expressed her gratitude for services rendered by O'Sullivan, and had told him that he would find she had not been unkindful of them, and that in a prior will, superseded by the present will, she had left him a legacy of fifty pounds,

WILL—continued.

and that he was not therein appointed executor:—*Held*, that such evidence was sufficient to rebut the presumption that the legacy was given to O'Sullivan in his character of executor only, and that he was entitled to the same. **NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED v. DOYLE** 626

13. — *Power of appointment by will—Will not referring to power—Wills Act 1890 No. (1159), s. 25—General devise or bequest—Appointment of executors—Administration of appointed fund.*] A testator left a sum of 2000*l.* to trustees upon trust to pay the income to an unmarried woman during her life, and from and after her decease upon such trusts and in such manner as she should by will appoint, and in default of appointment, and so far as any such appointment should not extend, to her children, and in default of children he directed that such sum or such unappointed part thereof should fall into his residuary estate. The woman subsequently married, and, without having had any children, died, leaving other property and leaving a will in no way referring to the power of appointment. By such will she provided that after paying her just debts she gave and bequeathed certain legacies to her mother, father, brothers, and children of deceased brothers, and appointed an executor; she then gave her jewellery to her mother, except her engagement ring, which she bequeathed, with all else she might leave at the time of her death, to her husband:—*Held* that by virtue of the *Wills Act 1890* (No. 1159) her will must be regarded as an exercise by her of her power of appointment; that she had so appointed the settled fund as to show an intention to take it out of the settlement and make it her own; and that the will was to be read as though it were an appointment of the property to the executor upon trust to pay debts, etc., and therefore the trustees of the settlement had no power to distribute it among the legatees as her appointees, but should hand the fund over to her executor to be administered by him under her will. **THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED v. CROOKE** 853

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 apart from sec. 14 of the *Wrongs Act 1890* (Lord
 Campbell's Act), and the damages awarded are
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 latter Act. A jury is not indispensable in an
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